No.

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN P. KORN
Petitioner

Vrs.

NANCY BANKS, IN HER OFFICIAL CAPACITY
AS CLERK FOR THE CITY OF SOUTHFIELD
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

STEPHEN P. KORN P-30913
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WARREN, MICHIGAN 48093
586-751-1696

HON. WILLIAM LUCAS P-16840
Counsel for Appellant
Member of Bar of US Supreme Court

Lower Court Counsel for Appellant
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QUESTION PRESENTED FOR REVIEW

1) Whether Michigan's Court of Appeals decision affirming the Trial Court's dismissal of the instant action on Motion of Summary Disposition violates the 14th Amendment to the United States Constitution, contrary to Brown v. Board of Education, in applying Michigan's Election Law and Freedom of Information Law differently in the cases of two Michigan Clerks; ie. an African American Male Clerk, and a White American Female Clerk?

   A. When the African American Male Clerk refused to produce "public election records", the African American Male was charged, tried, convicted, and sent to jail for failing to produce such records. All records were ultimately produced.

   When the White American Female Clerk refused to produce "public election records", the White American Female was given a pass from prosecution and incarceration; No records were ordered produced, and the case requesting such information was dismissed on Motion for Summary Disposition. This Clerk answered no questions and produced no records.

   B. When the African American Male Clerk was thought to have "obstructed justice" in the election records case, the African American Male was charged, tried, convicted, and sent to jail for obstruction of justice.

   When the White American Female Clerk allegedly reported to the State's Bureau of Elections that she had destroyed the very absentee ballots which were under injunctive order in this very litigation, the White Female Clerk avoided civil and criminal exposure as the Trial Court granted Summary Disposition to this Clerk, affirmed by Michigan's Court of Appeals. Although the White American Female Clerk may well have obstructed justice in the case at bar, the Trial Court and the Michigan Appellate Court failed to permit the slightest time for an evidentiary hearing.

C. When the Michigan Appellate Court chose to "set an example" of an African American Male Clerk for: a) failing to turn over public election records; and b) obstruction of justice; the rationale adopted by Michigan's Court of Appeals in People v. Willie Jenkins, was certain and firm.

When the Trial Court and Michigan's Appellate Courts chose "not to set an example" of a White American Female Clerk for: a) failing to turn over public election records; and b) obstruction of justice; the rationale adopted by Michigan's Court of Appeals in People v. Willie Jenkins, was ignored.

INTRODUCTORY STATEMENT

This appeal is taken from a Judgment of the Michigan Court of Appeals dated July 27, 2004 affirming a Trial Court Dismissal of a Freedom of Information/Election Law action prior to Trial of October 3, 2003. The Judgment of the Michigan Court of Appeals in the case at bar involving a White American female Clerk from Oakland County, is at odds with the Judgment of the Michigan Court of Appeals from a different panel of the Court, involving Mr. Willie Jenkins, an African American male Clerk from the Township of Buena Vista, as addressed in People v. Jenkins, 244 MA 1, 624 NW2d 457 (2000). Mr. Jenkins, an African American male clerk was charged with violation of Michigan's Election Law and obstruction of justice in failing to turn over requested election records. Mr. Jenkins was required to stand trial, answer questions under oath, and was compelled to turn all election materials over for public scrutiny, (including the unopened, uncounted absentee ballots). Mr. Jenkins was charged, convicted, and later sentenced to jail for ten years, serving eighteen months of the sentence incarcerated.

The Defendant in the case at bar, is a White American female clerk who refused to turn over election records, as well. She admitted to destroying some of the election materials during the lower Court proceedings, and is suspected of destroying the very election ballots, (the unopened, uncounted absentee ballots, as reported by Mr. Brad Wittman of the Michigan Department of Elections) which are an important part of the "public information",

sought to be produced in the instant case. Notwithstanding the foregoing, the Defendant was not required to stand trial; was not required to answer one question under oath; and was not required to turn over any election materials for public scrutiny. This White American female clerk was not charged with any violation of the Election law, nor was she sentenced to incarceration, as was Mr. Jenkins.

Although the Jenkins case, supra, was cited in Appellant's Trial Court pleadings, and again in Appellant's pleadings in the Court of Appeals, both Courts were silent as to the justification for the different treatment afforded the different clerks, of different races, of different sexes, from different counties. Both clerks refused to turn over public information involving Election records. The African American male clerk went to jail and produced everything, (published decision). The White American female clerk opposed Trial successfully and produced nothing, (unpublished decision).

Plaintiff/Appellant has been denied a Trial according to law; and even the slightest evidentiary hearing to determine if the information sought in this Election Law/ Freedom of Information Law case even exists. The report of the destruction of the subject absentee ballots came from an official of Michigan's Department of Elections, and such destruction would have been contemptuous at best, and obstruction of justice, perhaps, in the face of an injunction prohibiting such destruction.

Public information should be made available without regard to whether a clerk is male or female, African American or White. The Trial Court and the Michigan Appellate Courts failed to address the disparate treatment afforded the African American male clerk, and the White Female clerk in the instant case.

Michigan's Freedom of Information Law and Michigan's Election Law would allow the public access to information behind the scenes of its government and government officials. This was intended to make government process accessible to the public it serves. The case at bar demonstrates what can happen when the "Goliath" of government is permitted to hide behind its strength of public tax dollars to burden any "David" who would dare to request that public information be made public. Michigan statute calls for an "expedited" trial, not for years and years of "pre-trial motions", briefs and discovery. At the end of this day, the Trial Court's dismissal precluded any public information to be forthcoming regarding a particular election in 1999. There was never a

Trial, nor the slightest evidentiary hearing to determine if the White American Female clerk had honored the Trial Court's in junction not to destroy some of the materials requested, as was reported by an official of the Michigan Department of Elections.

Michigan's Freedom of Information Law and Michigan's Election Law are not applied fairly and consistently in the State of Michigan, as reflected in the instant case. There is clearly disparate treatment afforded an African American male clerk from one county, and a White American female clerk from another county. The Trial Court and the Appellate Courts are silent as to any rationale for this disparate treatment:

A. The African American male clerk is charged, tried - convicted, and incarcerated for failing to turn over election records, and in the end, all requested election records are produced, (including the unopened counted absentee election ballots from a prior election).

B. The White American female clerk, never stands Trial; never answers one question under oath; and is compelled to produce no election records, (including the unopened, uncounted absentee election ballots from a prior election).

This does not pass the test of fundamental fairness to understand that Mr. Willie Jenkins went to jail and had to produce all election records, under the same laws that were applied differently to this Clerk who never stood Trial, and produced no records. Where is the justice? Where is the due process? Where is the equal protection under the law?

Since 2000, the talk of Election Reform has reached all fifty states. Michigan's Election Law and Michigan's Freedom of Information Law would permit such a review. In the case of Mr. Jenkins, all materials were forthcoming. In the instant case, there was no Trial after twenty three months. There was no Evidentiary Hearing after twenty three months. There were no records produced in twenty three months. The scales of justice should balance based on fair and equal justice under the law. The weight of the scales should not appear to favor one racial group over another; one ethnic group over another; one sex over another; one age group over another.

On this record, Petition for Certiorari is sought.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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CITATIONS OF OPINIONS AND ORDERS

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Order of the Michigan Supreme Court dated February 28, 2005
427 Mich 867, 2005

Order of the Michigan Court of Appeals dated July 27, 2004
Unpublished opinion

STATEMENT OF JURISDICTION

On July 8, 2005, the Supreme Court of Michigan, the state's highest state court, issued the opinion which gives rise to this appeal. The jurisdiction of this Court is invoked under 28 USC sec 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES

14th AMENDMENT TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MCLA sec. 15.240 sec. 10(5)

"An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."

MCLA sec. 168.931 Prohibited conduct; violation as misdemeanor; "valuable consideration" defined.

Sec. 931.

(1) A person who violates 1 or more of the following subdivisions is guilty of a misdemeanor:

(a) A person shall not, either directly or indirectly, give, lend, or promise valuable consideration, to or for any person, as an inducement to influence the manner of voting by a person relative to a candidate or ballot question, or as a reward for refraining from voting.

(b) A person shall not, either before, on, or after an election, for the person's own benefit or on behalf of any other person, receive, agree, or contract for valuable consideration for 1 or more of the following:

(i) Voting or agreeing to vote, or inducing or attempting to induce another to vote, at an election.

(ii) Refraining or agreeing to refrain, or inducing or attempting to induce another to refrain, from voting at an election.

(iii) Doing anything prohibited by this act.

(iv) Both distributing absent voter ballot applications to voters and receiving signed applications from voters for delivery to the appropriate clerk or assistant of the clerk. This subparagraph does not apply to an authorized election official.

(c) A person shall not solicit any valuable consideration from a candidate for nomination for, or election to, an office described in this act. This subdivision does not apply to requests for contributions of money by or to an authorized representative of the political party committee of the organization to which the candidate belongs. This subdivision does not apply to a regular business transaction between a candidate and any other person that is not intended for, or connected with, the securing of votes or the influencing of voters in connection with the nomination or election.

(d) A person shall not, either directly or indirectly, discharge or threaten to discharge an employee of the person for the purpose of influencing the employee's vote at an election.

(e) A priest, pastor, curate, or other officer of a religious society shall not for the purpose of influencing a voter at an election, impose or threaten to impose upon the voter a penalty of

excommunication, dismissal, or expulsion, or command or advise the voter, under pain of religious disapproval.
(f) A person shall not hire a motor vehicle or other conveyance or cause the same to be done, for conveying voters, other than voters physically unable to walk, to an election.
(g) In a city, township, village, or school district that has a board of election commissioners authorized to appoint inspectors of election, an inspector of election, a clerk, or other election official who accepts an appointment as an inspector of election shall not fail to report at the polling place designated on election morning at the time specified by the board of election commissioners, unless excused as provided in this subdivision. A person who violates this subdivision is guilty of a misdemeanor, punishable by a fine of not more than $10.00 or imprisonment for not more than 10 days, or both. An inspector of election, clerk, or other election official who accepts an appointment as an inspector of election is excused for failing to report at the polling place on election day and is not subject to a fine or imprisonment under this subdivision if 1 or more of the following requirements are met:
(i) The inspector of election, clerk, or other election official notifies the board of election commissioners or other officers in charge of elections of his or her inability to serve at the time and place specified, 3 days or more before the election.
(ii) The inspector of election, clerk, or other election official is excused from duty by the board of election commissioners or other officers in charge of elections for cause shown.
(h) A person shall not willfully fail to perform a duty imposed upon that person by this act, or disobey a lawful instruction or order of the secretary of state as chief state election officer or of a board of county election commissioners, board of city election commissioners, or board of inspectors of election.
(i) A delegate or member of a convention shall not solicit a candidate for nomination before the convention for money, reward, position, place, preferment, or other valuable consideration in return for support by the delegate or member in the convention. A candidate or other person shall not promise or give to a delegate money, reward, position, place, preferment, or other valuable consideration in return for support by or

vote of the delegate in the convention.

(j) A person elected to the office of delegate to a convention shall not accept or receive any money or other valuable consideration for his or her vote as a delegate.

(k) A person shall not, while the polls are open on an election day, solicit votes in a polling place or within 100 feet from an entrance to the building in which a polling place is located.

(l) A person shall not keep a room or building for the purpose, in whole or in part, of recording or registering bets or wagers, or of selling pools upon the result of a political nomination, appointment, or election. A person shall not wager property, money, or thing of value, or be the custodian of money, property, or thing of value, staked, wagered, or pledged upon the result of a political nomination, appointment, or election.

(m) A person shall not participate in a meeting or a portion of a meeting of more than 2 persons, other than the person's immediate family, at which an absent voter ballot is voted.

(n) A person, other than an authorized election official, shall not, either directly or indirectly, give, lend, or promise any valuable consideration to or for a person to induce that person to both distribute absent voter ballot applications to voters and receive signed absent voter ballot applications from voters for delivery to the appropriate clerk.

(2) A person who violates a provision of this act for which a penalty is not otherwise specifically provided in this act, is guilty of a misdemeanor

(3) A person or a person's agent who knowingly makes, publishes, disseminates, circulates, or places before the public, or knowingly causes directly or indirectly to be made, published, disseminated, circulated, or placed before the public, in this state, either orally or in writing, an assertion, representation, or statement of fact concerning a candidate for public office at an election in this state, that is false, deceptive, scurrilous, or malicious, without the true name of the author being subscribed to the assertion, representation, or statement if written, or announced if unwritten, is guilty of a misdemeanor.

(4) As used in this section, "valuable consideration" includes, but is not limited to, money, property, a gift, a prize

or chance for a prize, a fee, a loan, an office, a position, an appointment, or employment.

MCLA sec. 750.505; MSA 28.773 provides:

"Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court.

STATEMENT OF THE CASE

On October 19, 2001, Appellant wrote to Appellee requesting "that the records and documents associated with the November 2, 1999 election be made available for my inspection...." Reference in this letter was made to the position taken by the Michigan Department of Elections, to wit:

"In closing, it merits note that the records and documents associated with the election are on public record and available for your inspection at your request."

Correspondence from the Michigan Department of State of September 21, 2001

[APPENDIX E].

On October 31, 2001, Defendant wrote to Appellant, in part:

"Dear Mr. Korn:

The City of Southfield has received your request to inspect and copy public records associated with the November 2, 1999 election. Specifically, you stated:

I am particularly interested in all absentee ballots, which were cast in that election; the ones, which were counted; and the ones that were not counted. In addition, I would like to review all records and data associated with the conduct of this election by your office. What applications for absentee ballots went out? What requests for absentee ballots came back? What absentee ballots went out? What absentee ballots came back?

Your request to inspect and copy public records has been carefully reviewed. Please be advised that your request is denied.

Many of the records that you requested to inspect do not exist...."

Sincerely,
Nancy L. M. Banks
Freedom of Information Coordinator
City of Southfield"

[APPENDIX F]

Mr. Willie Jenkins said no to the production of election materials. His "no" led to Count IV of the Second Amended Information:

COUNT IV
ELECTION LAW – FAILURE TO PERFORM A DUTY

One Willie Carl Jenkins, Sr., late of the County of Saginaw, State of Michigan, did, or about August 5, 1996, in the County of Saginaw, State of Michigan, willfully fail to perform a duty imposed upon him by section 168.760 of the Michigan election law by refusing to allow public inspection of the absentee voter ballot applications and / or lists at all reasonable hours; contrary to MCL 168.931(1)(h); MSA 6.1931 [168.9311M].

MISDEMEANOR: 90 days and / or $500.00

[See Appendix G].

The Southfield City Clerk's no remained firm for close to six (6) months without consequence. There would be no information forthcoming from this Clerk.

On November 2, 2001, Appellant filed a Complaint in the Circuit Court for the County of Oakland. On October 3, 2003, the Trial Court issued its ORDER AND OPINION dismissing the case. There was no Trial. There was no testimony. There was no production of any documents. [See Appendix D].

Whether or not the Southfield City Clerk destroyed the very ballots she was told not to destroy through the Trial Court's injunctive order is not known. Arguably, such an act might well constitute obstruction of justice. There was no evidentiary hearing conducted in the Trial Court. In the case of Willie Jenkins, supra, an attempt to create a document during the Grand Jury proceedings, led to his being charged with Obstruction of Justice and Conspiracy:

COUNT I
OBSTRUCTION OF JUSTICE

One Willie Carl Jenkins, Sr. late of the County of Saginaw, State of Michigan, did, on October 31, 1996, in the County of Saginaw, State of Michigan, commit the crime of Obstruction of Justice by knowingly participating in fabricating false, inaccurate or mislead-

ing evidence material to a grand jury investigation, to wit: by creating or assisting in creating a certificate of oath of office, dated July 9, 1996, reflecting the appointment of Robert Woods as deputy registrar/elections officer when such positions did not exist under Michigan law, after the grand jury requested to view said document, contrary to MCL 750.505; MSA 28.773 [750.505-A].

FELONY: 5 years and / or $10,000.00

COUNT II
CONSPIRACY

One Willie Carl Jenkins, Sr., late of the County of Saginaw, State of Michigan, did, on or about October 31, 1996, in the County of Saginaw, State of Michigan, unlawfully conspire, combine, confederate and agree together with Maxine C. King to commit an offense prohibited by law, to wit: obstruction of justice; contrary to MCL 750.157a; MSA 28.354(1) [750.505-A] [C].

FELONY: 5 years and / or $10,000.00

See [Appendix G].

On October 24, 2003, Appellant filed a Claim of Appeal. On November 7, 2003, Appellee filed a Claim of Cross Appeal. On July 27, 2004, the Court of Appeals issued its unpublished opinion affirming the decision of the Trial Court. [See Appendix C].

On February 28, 2005, the Michigan Supreme Court declined to review the lower Courts' decisions. On July 8, 2005, the Motion filed for Reconsideration was denied.
[See Appendix B and Appendix A].

This Petition for Certiorari is filed to challenge the unfair application of Michigan's Freedom of Information Law and Michigan's Election Law in the instant case involving a White American Female Clerk, as distinguished from the application of the same laws in the case involving Mr. Willie Jenkins, an African American Male Clerk. The Trial Court and the Michigan Court of Appeals never discussed the application of the State's laws in the case of Mr. Willie Jenkins, and their rationale for applying a different view in the instant case. The Michigan Supreme Court did not grant leave to appeal.

Mr. Willie Jenkins was sentenced to jail for ten (10) years for failing to produce certain records and for obstruction of justice. The Clerk in the instant case was not ordered to produce any records, nor was there an evidentiary hearing to determine if the absentee ballots under litigation were destroyed in violation of the lower court's injunctive ruling.

The application of our laws should not be based on race, sex, age, or ethnicity. The lower Court's findings that records were not requested and that there was a lack of progress in the case to justify the result is respectfully not supported by the facts. All records were requested. Twenty-three months passed without an evidentiary hearing or a Trial. This Clerk answered no questions under oath, never stood trial.

Our Courts should do its best to insure that interpretation of these laws are fair to all, regardless of race, sex, age, or ethnicity.

ARGUMENT FOR ALLOWANCE OF THE WRIT

Justice was swift for Mr. Willie Jenkins. He was charged, tried, convicted, sentenced to jail, incarcerated, and all election records were put forward in a process orchestrated with the cooperation of the Michigan State Police and the Michigan Department of Elections. Mr. Willie Jenkins was an African American Male Clerk from Buena Vista Township, who had refused to turn over requested records to the Michigan State Police, on the "purported advice" of his attorney.

Ms. Nancy Banks, Clerk for the City of Southfield, said "no" in an absolute manner, and she has never had to answer one question under oath, or produce one record. Whether Ms. Banks destroyed the absentee ballots in dispute in violation of the Trial Court's injunction or not will never be known, as there was no Trial, or evidentiary hearing conducted by the Trial Court after twenty-three months of waiting.

The African American Male Clerk is compelled to produce all records including unopened, uncounted absentee ballots. The White American Female Clerk is not compelled to produce any records.

The scales of justice should not provide "different" justice depending on race or sex. The scales of justice should not provide "different" justice depending on age or ethnicity.

Brown v. Board of Education, 347 US 483 (1954) did away with "separate but equal" considerations. The result in the case at bar is respectfully challenged. The result in the case at bar suggests the notion of "separate but unequal". Either interpretation would violate constitutional mandates, and particularly those set forth in the 14th Amendment to the United States Constitution:

> "All persons born or naturalized in the United States, And subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The lower Courts are silent as to why the records were produced, including the unopened, uncounted absentee ballots, in a process developed by the Michigan State Police and the Michigan Department of Elections, in the People v. Jenkins, 624 NW2d 457 (2000), and that the rules are different here.

The lower Courts are silent as to why Mr. Willie Jenkins went to jail for failing to produce election records and obstruction of justice, while the Clerk in the instant case was able to avoid the production of all documents, and avoid compulsory attendance at an evidentiary hearing or trial to determine if the subject matter of this litigation was destroyed by this Clerk in violation of the lower Court injunction prohibiting such destruction.

If the Clerk in the case at bar destroyed the particular absentee ballots at issue, arguably this would constitute "obstruction of justice" as defined in the Jenkins case, supra. In the instant case, there was never an evidentiary hearing conducted in the Trial Court to determine if the subject ballots had been destroyed, so as to "obstruct justice"

Justice was swift in the Jenkins case, supra. After twenty-three months in the Trial Court in the instant case, there was no Trial or evidentiary hearing of any kind. Respectfully, such dismissal is indicative of a backlog in the lower Court, and not a lack of

progress in the case. MCLA sec. 15.240 calls for "hearing and trial or for argument at the earliest practicable date and expedited in every way." No Trial or evidentiary hearing in twenty-three months is respectfully not "expedited."

Michigan's Election Law and Michigan's Freedom of Information needs this Court's review. There is no rationale for sending Mr. Jenkins to jail "for failure to perform a duty, and obstruction of justice," and to allow the Clerk in the instant case to receive a "pass" for her conduct.

The scales of justice should appear to be balanced in the application of the law. There is no rational basis, or compelling state interest in interpreting Michigan's Freedom of Information Law and Michigan's Election Law to send Willie Jenkins, (an African American Male) to jail, and produce all election materials, including unopened, uncounted absentee ballots; and to allow the Southfield City Clerk, (a White American Female) a pass from all obligations.

The lower Courts did not recognize People v. Jenkins, 624 NW2d 457 (2000), as worthy of consideration. This Petition for Writ of Certiorari should be allowed to address the fair application of Michigan's Election Law and Michigan's Freedom of Information Law, so that the public perception of these laws will not be that the double standards of justice are revisited.

ARGUMENT

The Michigan Appellate Court erred in affirming the Trial Court's dismissal of the instant action on Motion of Summary Disposition violates the 14th Amendment to the United States Constitution, contrary to Brown v. Board of Education, in applying Michigan's Election Law and Freedom of Information Law differently in the cases of two Michigan Clerks; ie. an African American Male Clerk, and a White American Female Clerk.

A. When the African American Male clerk refused to produce "public election records", the African American was charged, tried, convicted, and sent to jail for failing to produce such records. All records were ultimately produced.

When the White American Female Clerk refused to produce "public election records", the White American Female was given a pass from prosecution and incarceration; No records were ordered produced, and the case requesting such information was dismissed on Motion for Summary Disposition. This Clerk answered no questions and produced no records.

B. When the African American Male Clerk was thought to have "obstructed justice" in the election records case, the African American Male was charged, tried, convicted, and sent to jail for obstruction of justice.

When the White American Female Clerk allegedly reported to the State's Bureau of Elections that she had destroyed the very absentee ballots which were under injunctive order in this very litigation, the White Female Clerk avoided civil and criminal exposure as the Trial Court granted Summary Disposition to this Clerk, affirmed by Michigan's Court of Appeals. Although the White American Female Clerk may well have obstructed justice in the case at bar, the Trial Court and the Michigan Appellate Court failed to permit the slightest time for an evidentiary hearing.

C. When the Michigan Appellate Court chose to "set an example" of an African American Male Clerk for: a) failing to turn over public election records; and b) obstruction of justice; the rationale adopted by Michigan's Court of Appeals in People v. Willie Jenkins, was certain and firm.

When the Trial Court and Michigan's Appellate Courts chose "not to set an example" of a White American Female Clerk for: a) failing to turn over public election records; and b) obstruction of justice; the rationale adopted by Michigan's Court of Appeals in People v. Willie Jenkins, was ignored.

The Trial Court and the Michigan Court of Appeals failed to address the considerations addressed in People v. Jenkins 624 NW2d 457 (2000). The Courts in the instant case achieved a different

result by ignoring the Jenkins case, supra. There was a lot of discussion in the lower Courts about privacy, and what information could be produced; what information should not be produced. In the Jenkins case, supra, all information was produced without qualification, or hesitation. The process was orchestrated through the Michigan State Police and the State of Michigan Bureau of Election. In the Jenkins case, supra, obstruction of justice was acted upon. In the instant case, the suggestion that the subject absentee ballots were destroyed did not satisfy the Trial Court or the Michigan Court of Appeals that an evidentiary hearing would be in order.

The Trial Court determined that there was a "lack of progress" in the case, although there was twenty-three months of Trial Court delay and no evidentiary hearings or Trials conducted. The Court of Appeals determined that information was not requested from this Clerk which would be consistent with the Jenkins request, and yet, [Exhibit E] identifies the request for information as broad and inclusive.

Brown v. Board of Education, 347 US 483 (1954) did away with "separate but equal" considerations. The result in the case at bar is respectfully challenged. The result in the case at bar suggests the notion of "separate but unequal". Either interpretation would violate constitutional mandates, and particularly those set forth in the 14th Amendment to the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It makes no sense to this writer that an African American Male Clerk is charged, tried, convicted, sentenced to jail for ten years, serves eighteen months, and is ordered to turn over all election records for public inspection including the unopened, uncounted absentee ballots, arising from a prior election, and the views taken in

evidentiary hearing; from any consequence for refusing to turn over election records, and destroying many of the documents which were part of the public record of the election:

- Twenty-three months of delay in the Trial Court resulted in no Trial or evidentiary hearing in violation of the law requiring an expedited hearing.

MCLA sec. 15.240 sec. 10(5)

> "An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."

This Petition for Writ of Certiorari is brought to review the unfair application of Michigan's Freedom of Information Law and Michigan's Election Law. The People of the State of Michigan should have confidence that their laws are fairly applied and interpreted in a way, which comports with Due Process of Law and Equal Protection of the Law.

Respectfully, the records and information which were requested in the case at bar could have been easily provided in the like style and like manner as were the same records and information requested in the case of Buena Vista Township Clerk, Willie Jenkins.

If the Clerk in the case at bar destroyed the very subject of this litigation, she should have to answer for such obstruction to justice in the same fashion as Willie Jenkins. In 2005, our country should be beyond having rules for some, and different rules for others.

Respectfully, this Court should intercede.

In closing, welcome to the Bench, Judge Roberts, and congratulations on your appointment.

RELEIF

Appellant, respectfully prays that the Writ of Certiorari be ordered.

Respectfully submitted,

Stephen P. Korn
Appellant
Member of the Bar of the United States Supreme Court

Attorneys in the Lower Court

GARY R. SANFIELD
P-2798
Attorney for Appellant
Member of the Bar
of the State of Michigan

Honorable William Lucas
P-16840
Co-Counsel for Appellant
Member of the Bar of the
United States Supreme Court

APPENDIX A

DECISION OF THE MICHIGAN SUPREME COURT
DATED JULY 8, 2005

ORDER

Michigan Supreme Court
Lansing, Michigan

July 8, 2005

126818 & (69)

STEPHEN P. KORN
Plaintiff-Appellant,

V

SC: 126818
COA: 251827
Oakland CC: 2001-035929 CZ

SOUTHFIELD CITY CLERK
Defendant-Appellee.

_____/

On order of the Court, the motion for reconsideration of this Court's order of February 28, 2005 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 8, 2005

Corbin R. Davis

APPENDIX B

DECISION OF THE MICHIGAN SUPREME COURT
DATED FEBRUARY 28, 2005

ORDER

Michigan Supreme Court
Lansing, Michigan

February 28, 2005

126818 & (65)

STEPHEN P. KORN
Plaintiff-Appellant,

V

SC: 126818
COA: 251827
Oakland CC: 2001-035929 CZ

SOUTHFIELD CITY CLERK
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the July 27, 2004 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this court. The application for leave to appeal as cross-appellant is therefore moot and is denied.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 28, 2005

Corbin R. Davis

APPENDIX C

DECISION OF THE MICHIGAN COURT OF APPEALS
DATED
JULY 27, 2004

STATE OF MICHIGAN

MICHIGAN COURT OF APPEALS

STEPHEN P. KORN,

Plaintiff-Appellant/Cross-Appellee,

v

SOUTHFIELD CITY CLERK,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
July 27, 2004

No. 251827
Oakland Circuit Court
LC No. 2001-035929-CZ

Before: Griffin, P.J., and Cavananagh and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders denying his motions for trial and an order to show cause, and granting defendant's motion for confirmation of final order in this Freedom of Information Act (FOIA) case. Defendant cross appeals. We affirm.

Plaintiff claims that the trial court erred in denying his motion for trial, dismissing the bulk of his case, and subsequently granting defendant's motion for final judgment. (1) We disagree.

The primary reason the trial court denied the motion for trial and dismissed plaintiff's case is because he failed to make any progress on this side of the case. Defendant made a significant amount of information available to plaintiff. According to defendant's response, this material was everything plaintiff asked for except the absentee ballots and the ballot jackets. Despite over a year and a half passing, plaintiff never bothered to look at the material and determine what materials were provided. Dismissal of a suit for want of prosecution is a question left to the sound discretion of the trial court. "Appellate review is restricted to determining whether the is any justification in the

1 The central issue of the case is whether certain absentee ballots and ballot jackets can be released by defendant pursuant to plaintiff's FOIA request. The trial court dealt with this issue in a motion for judicial guidance brought by defendant. The second issue involves the release of collateral material to the ballots sought in the FOIA request. It is the second issue that the court dismissed. The court dismissed plaintiff's case on all issues except those dealt with in the motion for judicial guidance.

Record for the trial court's ruling." *Eliason Corp, Inc v Dept of Labor,* 133 Mich App 200, 203; 348 nw2D 315 (1984). Given these facts, justification existed for the trial court' ruling, and the trial court did not abuse its discretion in dismissing plaintiff's claim.

Further, dismissal was appropriate in light of a previous court order that directed defendant to issue a new response to plaintiff's FOIA request. The order also indicated that if plaintiff was not satisfied with this response, he was to amend his complaint removing defendant as a party and replacing her with the City of Southfield. Plaintiff failed to amend his complaint as mandated by this order. Although the trial court waited longer than the time allotted by the order, the dismissal was still proper and consistent with the order. Therefore, the trial court did not abuse its discretion in dismissing plaintiff's claims and subsequently did not err in denying plaintiff's motion for trial and granting defendant's motion for final judgment.

Next, plaintiff claims that the trial court erred in denying his motion to show cause why defendant should not be held in contempt of court. We disagree. The decision whether to issue an order of contempt is left to the sound discretion of the trial court and is reviewed for an abuse of discretion. Schoensee v Bennett, 228 Mich App 305, 316; 577 NW2d 915 (1998).

Plaintiff brought the show cause motion alleging defendant had violated a court order prohibiting the destruction of the absentee ballots and ballot jackets at issue in this case. MCR 3.606 governs the initiation of contempt proceedings for occurrences outside the immediate presence of the court and provides that proceedings can only be initiated "on a proper showing on ex parte motion

supported by affidavits." MCR 3.606. MCR 2.119(B) requires affidavits to be made on personal knowledge and state with particularity facts admissible as evidence. The material offered by plaintiff was not sufficient since it was not based on personal knowledge and was likely inadmissible double hearsay. Therefore, the trial court did not abuse its discretion with regard to the contempt proceedings. See Schoensee, supra.

Plaintiff next claims that the trial court's ruling that the absentee ballot jackets were exempt from disclosure under the FOIA was erroneous. We disagree. Whether a public record is exempt from disclosure pursuant to the FOIA is a question of law reviewed de novo. Larry S Baker PC v Westland, 245 Mich App 90, 93; 627 NW2d 27 (2001).

MCL 15.243(1) states, in pertinent part:

A public body may exempt from disclosure as a public record under this act:

(a) Information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

Thus there is a two-part analysis; first, whether the information would be personal in nature and, second, whether disclosure of it is a clearly unwarranted invasion of an individual's privacy. Larry S Baker PC, supra, at 94. Information is personal in nature if it reveals intimate or embarrassing details of an individual's private life. Id. at 95. The information contained on the ballot jackets themselves does not seem to rise to the level of intimate or embarrassing since it merely includes the voter's name, address, signature, and the signature of any person who assisted him or her—not embarrassing or intimate facts. And defendant does not content otherwise.

But this Court cannot consider the information contained on the ballot jackets in isolation, we must also consider release of the ballots. The Michigan Constitution, Const 1963, art 2, sec 4, guarantees the right to a secret ballot in all elections. Such a right cannot be abrogated absent a showing that the voter acted fraudulently.

Schellenberg v Rochester Lodge No 2225 of the Benevolent & Protective Order of Elks, 228 Mich App 20, 29; 577 NW2d 163 (1998), quoting Belcher v Ann Arbor Mayor, 402 Mich 132, 134; 262 NW2d 1 (1978). How a person voted is certainly intimate; therefore, the information qualifies under the first prong of the test. In fact, release of the person's name along with their ballot and vote may be unconstitutional in the State of Michigan. Const 1963, art 2, sec 4; Schellenberg, supra.

In evaluating whether information falls within the second part of the exemption, this Court must balance the public interest in disclosure against the interest the Legislature intended the exemption to protect. Kocher v Dep't of Treasury, 241 Mich App 378, 382; 615 NW2d 767 (2000). The only relevant public interest in disclosure that this Court may weigh is the extent to which disclosure would contribute to the public understanding of the operations and activities of government (which is the core purpose of FOIA). Id., quoting United States Dep't of Defense v Federal Labor Relations Authority, 510 US 487, 495; 114 S Ct 1006; 127 L Ed 2d 325 (1994). This important purpose "is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct." Kocher, supra, quoting Mager v Dep't of State Police, 460 Mich 134, 144-146; 595 NW2d 142 (1999). In the typical case where one private citizen is attempting to discover information about another private citizen through the FOIA, the requestor is not truly seeking to shed light on the agency's activities. Kocher, supra (further citation omitted).

Plaintiff's inquiry seems to be an attempt to obtain personal information on third parties and not a proper inquest to shed light on governmental activities. This Court has stated that such an attempt is improper. Id. at 382-383. The disclosure of this information would constitute an unwarranted invasion of an individual's privacy. Id. Although the ballot jacket information absent the voting record may not fall within the exemption to the FOIA, the release of the information with the individual's vote, as plaintiff requested, would fall within the exemption. The trial court dealt with this issue by limiting the access to one of the two items. The trial court's decision is not contrary to MCL 15.243 (1)(a). We find no error in this solution to the potential problem.

Finally, plaintiff claims that the trial court's decision to dismiss and not release the ballot jackets is contrary to Michigan Election Law. Specifically, plaintiff claims that defendant has violated MCL 168.760 and 168.931(1)(h) by not turning over the information. First, MCL 168.760 does not require defendant to turn over the absentee ballot jackets as plaintiff claims. It merely requires defendant to keep a list of absentee ballot applications and such things as the date the ballot was received. Plaintiff does not contend that defendant refused him access to such a list. Therefore, MCL 168.760 does not apply to this case.

Next, MCL 168.931(1)(h) states:

A person shall not willfully fail to perform a duty imposed upon that person by this act, or disobey a lawful instruction or order of the secretary of state as chief state election officer or of a board of county election commissioners, board of city election commissioners, or board of inspectors of election.

There is no contention that defendant disobeyed an instruction of any of the individuals listed in the statute. Plaintiff only claims that defendant failed to perform a duty under the act by not turning over the ballot jackets. But as concluded above, the trial court's decision was not erroneous. Therefore, defendant did not fail to perform a duty and MCL 168.931(1)(h) does not apply.

Plaintiff asserts on appeal that if the ballots and the ballot jackets cannot be released together, he would prefer the ballot jackets rather than the ballots. Plaintiff did not raise this issue below and did not ask for such relief from the trial court. This Court need not address an issue raised for the first time on appeal, as it is not properly preserved for appellate review. FMB-First Nat'l Bank v Bailey, 232 Mich App 711, 718; 591 NW2d 676 (1998).

Defendant raises two issues on cross appeal, both related to the trial court's ruling in its order of judicial guidance that the absentee ballots, in an of themselves and not in conjunction with the ballot jackets, are not exempt from disclosure under the FOIA. First, defendant contends that the ballots are exempt from disclosure pursuant to MCL 15.243(1)(d). We disagree.

MCL 15.243(1)(d) states:

(1) A public body may exempt from disclosure as a public record under this act any of the following:

***

(d) Records or information specifically described and exempted from disclosure by statute.

Defendant first cites MCL 168.764a(5), which states that it is a violation of election law for a person other than the absent voter to be in possession of a voted or un-voted absent voter ballot. Defendant also cites MCL 168.932(f), which makes it a felony for anyone other than the absent voter to "Possess an absent voter ballot mailed or delivered to another person, regardless of whether the ballot has been voted." The parties dispute whether plaintiff's review of the ballots would constitute possession.

Possession is not defined in either statute. The primary task in statutory construction is to give effect to the Legislature's intent. This Court achieves this purpose by applying the plain and unambiguous meaning of the words of the statute as written. Staton v Battle Creek, 466 Mich 611, 615; 647 NW2d 508 (2002). Consulting a dictionary is appropriate in determining the plain or ordinary meaning of a word. Id. at 617. Random House Webster's College Dictionary (1997) defines "possess" as: "to have as belonging to one; have as property; own." Although plaintiff will have the ballots or a copy of them in his hands, inspection under the FOIA does not seem to connote actual possession of the ballots. Plaintiff will not have ownership, dominion, or control over the ballots. He will merely be allowed to inspect them. Therefore, releasing the ballots would not violate the plain language of MCL 168.764a(5) or MCL 168.932(f).

Defendant next cites MCL 168.932(e)(i) which makes it a felony for a person not involved in the counting of ballots, and who has possession of an absent voter ballot mailed or delivered to another person, to open the envelope containing the ballot. Again, this statute uses the term possession and, as discussed above, plaintiff's inspection does not equate to possession of the ballots. Further, plaintiff would not be required to open the envelopes as discussed in the statute. In fact, the court's ruling that the ballot jackets were exempt would require defendant to open the envelopes and remove

the ballots in order for plaintiff to inspect them. Defendant does not deny that she is a person involved in the counting of ballots. Therefore, turning over the ballots independent of the ballot jackets would not violate MCL 168.932(3)(i).

Defendant also cites MCL 168.932(d), which states:

A person shall neither disclose to any other person the name of any candidate voted for by any elector, the contents of whose ballots were seen by the person, nor in any manner obstruct or attempt to obstruct any elector in the exercise of his or her duties as an elector under this act.

Defendant's argument implies that she will have to violate this statute if she turns over the ballots. We disagree. Defendant will not have to disclose the name of a candidate voted for by any elector/voter because the voter's name will remain secret. Defendant will not be informing plaintiff or anyone else whom an individual voter voted for as contemplated by the statute. But she will simply be turning over the ballots without the voter names. The statute does not cover this situation. To hold otherwise would mean that a person would be guilty of a felony for saying to another person the name of any candidate who received a vote. This interpretation would be absurd. Statutes are construed in harmony with the spirit or intent of the statute. This Court will avoid interpretations that lead to absurd or unreasonable results. Fletcher v Fletcher, 447 Mich 871, 880; 526 NW2d 889 (1994). Disclosure of the ballots is not contrary to MCL 168.932(d) unless such an absurd result is reached.

Finally, defendant claims that the ballots are exempt pursuant to MCL 15.243(1)(a). We disagree. As stated above, the threshold question is whether the information falls within the "personal" privacy exemption. Larry S Baker PC, supra at 94. Information is personal in nature if it reveals intimate or embarrassing details of an individual's private life. Id. Here, if the ballot were released with the voter's name, the information would be personal in nature. But separating the ballot from the ballot jacket would alleviate the privacy concerns. The ballots would only reveal the names of the candidate voted for and the office for which he or she ran, not the name of the voter. Thus, no matter the circumstance, each

voter's vote would remain secret. There would be no chance of voter intimidation or reprisal because the individual voters would remain anonymous; thus, such information should be released. See id. The trial court correctly ruled that the ballots separated from the ballot jackets were not exempt from disclosure under FOIA.

Affirmed.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

APPENDIX D

DECISION OF THE OAKLAND COUNTY CIRCUIT COURT
DATED OCTOBER 3, 2003

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

STEPHEN P. KORN,

Plaintiff,

-v- Case Number 2001-035929 CZ
Honorable Nanci J. Grant

NANCY BANKS, in her official capacity as
Clerk for the City of Southfield, Michigan

Defendant.

_____/

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ORDER AND OPINION

At a session of said Court, held in the Courthouse in the City of Pontiac, County of Oakland, State of Michigan on the 3rd day of October, 2003

PRESENT: THE HONORABLE NANCI J. GRANT,
CIRCUIT JUDGE

This matter comes before the Court on Plaintiff's motion for trial and on Defendant's motion for confirmation of final order. For the following reasons, Plaintiff's motion is denied and Defendant's motion is granted

This case arises out of a dispute over the results of a November 1999 election in the City of Southfield. One of the unsuccessful candidates discovered that the City had received 180 absentee ballots on election day, but had not opened or counted them because they arrived after the polls had closed. Thus, the candidate filed suit seeking an order compelling the votes to be considered in the election. That suit was dismissed and that ruling was affirmed on appeal.

Sometime thereafter, Stephen Korn filed a request with the City pursuant to the Freedom of Information Act (FOIA) seeking, among other things, to examine "all absentee ballots" cast in the November 1999 election. In particular, Plaintiff sought to examine both the ballots themselves and the ballot jackets that identify the voter. The City provided some information, but refused to let him examine the uncounted absentee ballots. Thus, Plaintiff filed the current action seeking relief under FOIA.

The City provided some materials pursuant to the request, but did not turn over or allow Plaintiff to inspect the unopened absentee ballots. Instead, the City filed a "motion for judicial guidance" regarding the absentee ballots, seeking a ruling that Defendant was not entitled to the ballots. The Court granted the motion in part in August 2002. Specifically, the Court ruled that Plaintiff was entitled to see the ballots themselves, but was not entitled not see the ballot jackets that contain voter information.

In so ruling, however, the Court noted that Plaintiff's entitlement to the documents was a close question and the ruling was likely to be appealed. Moreover, once relief was granted, it could not be "undone" in the event that the Court's ruling is reversed. Thus, the Court declined to enforce the award until the issues were addressed on appeal.

Several months after this ruling the parties filed the current motions. The issue in these motions is whether Plaintiff is entitled to a trial to pursue other information sought in his FOIA request. The City argues that the Court's ruling on the "motion for judicial

guidance" resolved all issues and, therefore, the case should be closed. Plaintiff, on the other hand, identifies the following issues for trial:

1. What documents are there for production
2. What documents were destroyed and the circumstances surrounding the destruction of documents;
3. The preservation of the documents, absentee ballots and absentee ballot jackets until such time as the Appellate Court can rule upon the request of Plaintiff to review the disputed absentee ballots and absentee jackets;
4. A procedure to review the authenticity of the disputed unopened, uncounted absentee ballots and their jackets;
5. A procedure to review the public records;
6. Statutory attorney fees.

The Court cannot accept the City's assertion that the ruling on the "motion for judicial guidance" addressed all claims raised in this action. The motion, after all, did not seek summary disposition, but rather addressed only the issue of the ballots. At the same time, however, the Court also notes that the ballots are by far the most important aspect of this case. Moreover, the issues that Plaintiff claims remain for trial are almost all dependent on the issue of the ballots. Finally, and most significantly, the Court notes that Plaintiff has not conducted discovery of any kind on the issues that he now claims remain for trial, despite the fact that the Court ruled on the motion for judicial guidance several months ago.

In this context, the Court finds that Plaintiff has waived his right to trial on any of the foregoing issues, at least prior to a ruling on the issues in the motion for judicial guidance. Thus, the Court shall grant the City's motion for confirmation of final order, and dismiss the remaining portions of Plaintiff's claim. The dismissal, however, is without prejudice, and may be raised again in the event that Plaintiff prevails on appeal.

Finally, the Court denies Plaintiff's request that Defendant Banks be held in contempt, as there is no indication that she has violated any court order.

The City's motion is granted and the case is dismissed.

NANCI J. GRANT, Circuit Judge

APPENDIX E

LETTER TO THE SOUTHFIELD CITY CLERK SEEKING ELECTION INFORMATION DATED OCTOBER 19, 2001

On October 19, 2001, Plaintiff/Appellant wrote to Defendant Appellee:

"Re: Freedom of Information Request;

Dear Ms. Banks,

"This letter is written to request that the records and documents associated with the November 2, 1999 election be made available for my inspection. I am particularly interested in all absentee ballots, which were cast in that election; the ones, which were counted; and the ones that were not counted. In addition, I would like to review all records and data associated with the conduct of this election by your office. What applications for absentee ballots went out? What requests for absentee ballots came back? What absentee ballots went out. What absentee ballots came back. Copies of this information may be requested.

According to the letter of the Michigan Department of State of September 21, 2001, which was sent to your office, this information is public information:

"In closing, it merits note that the records and documents associated with the election are on public record and available for your inspection at your request."

I am sending this request personally, and not on behalf of Councilman Sidney Lantz. Please let me know in writing what the position of your office is relative to this request."

Very truly yours,

Stephen P. Korn

SPK/ma"
(Exhibit I from Plaintiff's Complaint)

APPENDIX F

LETTER FROM THE SOUTHFIELD CITY CLERK DENYING ALL ELECTION INFORMATION DATED OCTOBER 31, 2001

On October 31, 2001, Defendant/Appellee wrote to Plaintiff/ Appellant:

"Re: Freedom of Information Request;

Dear Mr. Korn:

The City of Southfield has received your request to inspect and copy public records associated with the November 2, 1999 election. Specifically, you stated:

> I am particularly interested in all absentee ballots, which were cast in that election; the ones, which were counted; and the ones that were not counted. In addition, I would like to review all records and data associated with the conduct of this election by your office. What applications for absentee ballots went out? What requests for absentee ballots came back? What absentee ballots went out? What absentee ballots came back?

Your request to inspect and copy public records has been carefully reviewed. Please be advised that your request is denied.

Many of the records that you requested to inspect do not exist. All ballots from the 1999 election have been disposed of in accordance with state law with the exception of the absentee ballots that were received after the polls closed on November 2, 1999.

As you are aware, these absentee ballots are the same ballots that the subject of litigation that you have brought on behalf of your client, Mr. Lantz. (Sidney Lantz-vs- Southfield City Clerk, Oakland County Circuit Court case number 1999-019368-AW). The records you have requested to inspect and copy are records or information related to a civil action in which the requesting party and the public body are parties. These records are exempt from disclosure under the Freedom of Information Act. [MCL 15.243 (1)(v)]

In addition, records you have requested to inspect and copy are exempt from disclosure under the Freedom of Information Act for the following reasons:

Information included in these records is of a personal nature, and public disclosure of the information would constitute a clearly

unwarranted invasion of an individual's privacy.
[MCL 15.243(1)(a)]

Information included in these records is specifically described and exempted from disclosure by statute, to wit: the Election Code. [MCL 15.243(1)(D)]

You have a right to seek review of this denial. As required by the Freedom of Information Act, a written explanation of that right is enclosed with this letter.

Sincerely,
Nancy L. M. Banks
Freedom of Information Coordinator
City of Southfield"

(Exhibit II from Plaintiff's Complaint)

APPENDIX G

SECOND AMENDED INFORMATION

THE PEOPLE OF THE STATE OF MICHIGAN
V
WILLIE CARL JENKINS, SR.

SECOND AMENDED INFORMATION

THE PEOPLE OF THE STATE OF MICHIGAN
V **DC #97-5442-FY**
WILLIE CARL JENKINS, SR. **CC#98-015030-FH**
CTN #96-98-000002-01

STATE OF MICHIGAN, COUNTY OF SAGINAW,

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: FRANK J. KELLEY, Attorney General of the State of Michigan, and Amy M. Ronayne, Assistant Attorney General, who prosecute for and on behalf of the People of the State of Michigan, appear before this Court and inform the Court that on the date and at the location described, the defendant:

COUNT I

OBSTRUCTION OF JUSTICE

One Willie Carl Jenkins, Sr. late of the County of Saginaw, State of Michigan, did, on October 31, 1996, in the County of Saginaw, State of Michigan, commit the crime of Obstruction of Justice by knowingly participating in fabricating false, inaccurate or misleading evidence material to a grand jury investigation, to wit: by creating or assisting in creating a certificate of oath of office, dated July 9, 1996, reflecting the appointment of Robert Woods as deputy registrar/elections officer when such positions did not exist under Michigan law, after the grand jury requested to view said document, contrary to MCL 750.505; MSA 28.773 [750.505-A].

FELONY: 5 years and / or $10,000.00

COUNT II

CONSPIRACY

One Willie Carl Jenkins, Sr., late of the County of Saginaw, State of Michigan, did, on or about October 31, 1996, in the County of Saginaw, State of Michigan, unlawfully conspire.

combine, confederate and agree together with Maxine C. King to commit an offense prohibited by law, to wit: obstruction of justice; contrary to MCL 750.157a; MSA 28.354(1) [750.505-A] [C].

FELONY: 5 years and / or $10,000.00

COUNT III

ELECTION LAW-
APPOINTING CANDIDATE OR FAMILY MEMBERS TO RECEIVE ABSENTEE BALLOTS

One Willie Carl Jenkins, Sr., late of the County of Saginaw, State of Michigan, did, on or about July 19, 1996, in the County of Saginaw, State of Michigan, appoint Robert Woods as an assistant to accept delivery of absent voter ballots when he was a candidate and / or a member of the immediate family of James Woods, a candidate, appearing on the ballot for that election; contrary to MCL 168.764b and MCL 168.931; MSA 6.1764(2) and MSA 6.1931 [168.764B].

MISDEMEANOR: 90 days and / or $500.00

COUNT IV

ELECTION LAW – FAILURE TO PERFORM A DUTY

One Willie Carl Jenkins, Sr., late of the County of Saginaw, State of Michigan, did, or about August 5, 1996, in the County of Saginaw, State of Michigan, willfully fail to perform a duty imposed upon him by section 168.760 of the Michigan election law by refusing to allow public inspection of the absentee voter ballot applications and / or lists at all reasonable hours; contrary to MCL 168.931(1)(h); MSA 6.1931 [168.9311M].

MISDEMEANOR: 90 days and / or $500.00

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Amy M. Ronayne (P41113)
Assistant Attorney General
Criminal Division
PO Box 30218
Lansing, MI 48909
(517) 334-6010

Dated: May 1, 1998

APPENDIX H

FACTUAL BASIS FOR THE FAILURE TO PERFORM DUTY CHARGE IN COUNT FOUR OF THE SECOND AMENDED INFORMATION

THE PEOPLE OF THE STATE OF MICHIGAN
V
WILLIE CARL JENKINS, SR.

"On August 1, 1996, the Michigan State Police received a number of complaints about possible voter tampering in certain communities in Saginaw County, including Buena Vista Township. These complaints arose after more than two hundred envelopes and absent voter applications had been mailed from Lansing and received by the Saginaw City Clerk. The police department began a prompt investigation of the complaints because the primary election was to be held on August 6, 1996.

Detective Michael Hosh, Lieutenant Mark Dougovito, and Lieutenant Charles Bush arrived at the Buena Vista Township Clerk's Office on August 5, 1996, to investigate the complaints, but **defendant refused to permit the officers to review voting records for the township involving absentee ballot applications and the absentee poll book containing the records of applications that had been mailed for the current primary election.1....**

1. Defendant's refusal to allow inspection of the records was the basis for the failure to perform duty charge in count IV."

People v. Jenkins, 624 NW2d 457 at 459 (2000).

APPENDIX I

FACTUAL BASIS FOR THE OBSTRUCTION OF JUSTICE CHARGE IN COUNT ONE OF THE SECOND AMENDED INFORMATION

THE PEOPLE OF THE STATE OF MICHIGAN
V
WILLIE CARL JENKINS, SR.

"The evidence in this case showed that defendant [Willie Jenkins] created or assisted in the creation of a false, inaccurate, and misleading document that was material to a grand jury investigation.....

.....We conclude that the knowing assistance in fabricating false and fraudulent documents for presentation to a grand jury, with the intent to impede, thwart, or interfere with the administration of justice, constitutes obstruction of justice. Likewise, one who agrees, understands, plans, designs, or schemes to commit acts that obstructed or were intended to obstruct the administration of law engages in conspiracy to commit obstruction of justice. See People v. Ormsby, 310 Mich 291, 300, 17 NW2d 187 (1945). See also United States v. Mullins, supra (obstruction of justice was proved by evidence that defendant induced certain police officers to alter other officers' flight log, creating false and fraudulent entries, and then producing the altered flight logs in response to a grand jury subpoena issued in connection with a federal grand jury investigation); United States v. Siegel, supra at 531-532 (fabrication of false memoranda and swearing that the documents provided were complete records constituted obstruction of justice and perjury).

Accordingly, we conclude that defendant's [Willie Jenkin's] conduct in this case falls within the category of offenses that comprise common-law obstruction of justice, and the circuit court did not err in denying defendant's motion to quash the charges of obstruction of justice and conspiracy."

People v. Jenkins, 624 NW2d 457 at 465 and 466 (2000).

APPENDIX J

SENTENCE OF MR. WILLIE JENKINS

THE PEOPLE OF THE STATE OF MICHIGAN
V
WILLIE CARL JENKINS, SR.

"....The trial court then made the following remarks before imposing sentence:

The Court will say that this is a difficult case, because this is a defendant standing before the Court, Mr. Jenkins, who has a very good background, and who has, at times, served as a model to not only the youth of the community, but many adults, and who was entrusted with a significant amount of responsibility and trust, both as a teacher, coach, and ultimately an elected public official, and a clerk of Buena Vista Township, and who has, for whatever reason, violated that trust in a significant way.

The lesson to be imparted today is that the law will not tolerate tampering with the ballot box, including how people get their absentee ballots into that ballot box or otherwise, or obstructing the justice system. Our right to vote and our justice system are two of the cornerstones of our democracy and our precious freedom, and they so importantly distinguish and characterize our form of government.

To punish the defendant and to deter others from similar conduct, the Court imposes the following sentence. On Counts I and II, obstruction of justice and conspiracy, it is the sentence of the Court that the defendant [Willie Jenkins] be committed to the jurisdiction of the Michigan Department of Corrections and thereafter placed in an appropriate state penal institution. The Court fixes the minimum terms in Counts I and II, in my discretion, at 15 months, the maximum is set by law at five years, and I fix it in each count at five years.

We conclude that there was ample justification for the sentence imposed. The trial court properly considered defendant's [Willie Jenkins'] background, his service to the community, and his position as an elected township official who was granted the trust of his community, but violated that trust by committing the instant offenses. Defendant's [Willie Jenkins'] fifteen-month minimum sentences were proportionate to the offense and the offender and did not constitute an abuse of discretion. Milbourn, supra.

Affirmed."

People v. Jenkins, 624 NW2d 457 at 468 and 469 (2000).

[*All Election Records were ultimately produced, including the unopened, uncounted absentee ballots. The unopened, uncounted absentee ballots were opened in conjunction with the Michigan Department of Elections, utilizing a process to insure the privacy and integrity of each and every vote. The process involved the opening of the envelopes by one group, and a second group then evaluating the actual ballots].

*Lieutenant Detective Michael Hosh of the Michigan State Police

No. 05-476

In The Supreme Court of the United States

STEPHEN P. KORN,

Petitioner,

vs.

NANCY BANKS, IN HER OFFICIAL CAPACITY AS CLERK FOR THE CITY OF SOUTHFIELD,

Respondent.

On Petition For A Writ Of *Certiorari* To The Court Of Appeals For The State Of Michigan

RESPONSE TO PETITION FOR WRIT OF *CERTIORARI*

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Should the United States Supreme Court review a decision of a state's intermediate appellate court to affirm a state trial court's decision to summarily dismiss a plaintiff's state-based freedom of information lawsuit, when the information sought by the plaintiff would have revealed both the identity of a voter and how he or she had voted in a particular election?

LIST OF PARTIES

All parties in the action appear in the caption of the case on the cover page.

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CITATIONS OF OPINIONS AND ORDERS

October 3, 2003 Opinion and Order of the Honorable Nanci J. Grant, Circuit Judge, in *Stephen P. Korn v. Nancy Banks, in her official capacity as Clerk for the City of Southfield*, Oakland County Circuit Court (Michigan) Civil Action No. 2001-035929 CZ (unreported)

July 27, 2004 decision and opinion of the Michigan Court of Appeals in *Stephen P. Korn v. Nancy Banks, in her official capacity as Clerk for the City of Southfield, Michigan*, Court of Appeals No. 251827, *rel'd* 7/27/04 (unpublished)

February 28, 2005 Order of the Michigan Supreme Court in *Stephen P. Korn v. Nancy Banks, in her official capacity as Clerk for the City of Southfield, Michigan*, Supreme Court No. 126818, *rel'd* 2/28/05, 472 Mich. 867, 692 N.W.2d 839 (2005)

July 8, 2005 Order of the Michigan Supreme Court in *Stephen P. Korn v. Nancy Banks, in her official capacity as Clerk for the City of Southfield, Michigan*, Supreme Court No. 126818, *rel'd* 7/8/05, 473 Mich. 856, 699 N.W.2d 301 (2005)

STATEMENT OF JURISDICTION

Inasmuch as Petitioner did not raise any federal constitutional or statutory issues in the courts of the State of Michigan (*i.e.*, the Oakland County Circuit Court, the Michigan Court of Appeals and the Michigan Supreme Court) in the above-entitled cause of action, the Respondent, Ms. Banks, would respectfully suggest that this Honorable United States Supreme Court has no jurisdiction over the instant matter because the sole federal question raised in Petitioner's Petition for a Writ of *Certiorari*, whether or not there has been a denial of equal protection under the 14th Amendment of the United States Constitution, was *not* raised in Michigan's state courts. *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S. Ct. 1161, 22 L. Ed. 2d 398 (1969); see also the Judiciary Act of

1789, 1 Stat. 85, § 25, and *Crowell v. Randell*, 35 U.S. 368, 393-399, 9 L. Ed. 458 (1836).

CONSTITUTIONAL PROVISION

Ms. Banks acknowledges that Petitioner cites the 14th Amendment to the United States Constitution as being at issue. The 14th Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ms. Banks respectfully denies that the 14th Amendment has any application whatsoever to the issue of whether Petitioner's lawsuit against her should have been dismissed by the trial court, the Oakland County Circuit Court of the State of Michigan, for lack of prosecution when Petitioner failed to make any discovery for more than a year after being authorized to do so by the trial court.

INTRODUCTION

This litigation arises from a 1999 local government election in Michigan, in which one Sidney Lantz (hereinafter Mr. Lantz) won a two-year term to a city council. Had Mr. Lantz received more votes, he could have won a four-year term instead of a two-year term on the council[1]. Mr. Lantz filed suit against the city's clerk, Nancy Banks (Ms. Banks or Respondent), seeking access to certain information concerning the 1999 local election and the counting of

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[1] Mr. Lantz was re-elected to a second two-year term in 2001, finally winning a four-year term in 2003. His present term expires in 2007.

absentee ballots in that election. That suit was dismissed with prejudice by the trial court. The dismissal was affirmed on appeal. *Sidney Lantz v. Southfield City Clerk*, 245 Mich. App. 621, 628 N.W.2d 583 (2001), *lv. den.*, 465 Mich. 867, 634 N.W.2d 352 (2001), *cert. den.*, 534 U.S. 1080, 122 S. Ct. 811, 151 L. Ed. 2d 696 (2002)[1].

While Mr. Lantz was pursuing his case (ultimately, to no avail), his attorney, Petitioner in the case at bar, filed his own lawsuit against Ms. Banks under the Michigan Freedom of Information Act (MFOIA), MCL § 15.241 *et seq.*, P.A. 1976, No. 442. For all intents and purposes, Petitioner sought the same absentee ballot information in the 2001 case (that is, the matter currently before the United States Supreme Court) that Mr. Lantz sought in the 1999 case. The trial court dismissed Petitioner's case for lack of prosecution, albeit without prejudice. The Michigan Court of Appeals affirmed the dismissal, pointedly noting Petitioner's failure to pursue the case. *Stephen P. Korn v. Southfield City Clerk*, Michigan Court of Appeals No. 251827, *rel'd*, 7/27/2004 (unpublished), *lv. den.*, 472 Mich. 867, 692 N.W.2d 839 (2005), *recon. den.*, 473 Mich. 856, 699 N.W.2d 301 (2005).

Petitioner now claims an equal protection violation by all Michigan courts in the dismissal of his cause of action. Petitioner maintains that the dismissal of his case against a white female local government clerk is inconsistent with the decision of the Michigan Court of Appeals in *People v.*

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[1] In its 2001 decision, the Michigan Court of Appeals held that absentee ballots had to be received by the responsible local election official before the close of the polls on election day to be counted, which is in accord with the applicable Michigan election statute, MCL § 168.764a. No absentee ballots were received by the local post office the day of the 1999 city council election, so the purported failure of the defendant in *Lantz* to call the post office and inquire about undelivered absentee ballots prior to the hour set for poll closing (*i.e.*, 8:00 P.M.) was meaningless. Finally, the *Lantz* plaintiff's request for production of "all" of the absentee ballots in the election was properly rejected by the trial, as it was not even marginally relevant to the issue of the *uncounted* absentee ballots.

Jenkins, 244 Mich. App. 1, 624 N.W.2d 457 (2000). *People v. Jenkins* affirmed the criminal conviction of a male, allegedly black, local government clerk for obstruction of justice, conspiracy to obstruct justice and violation of Michigan election laws, specifically MCL § 168.931 (allowing a candidate or relative of a candidate to accept absentee ballots) and MCL § 168.931(1)(h) (refusal to allow public inspection of absentee voter ballot applications and lists).

Petitioner did not raise the issue of equal protection in the Michigan trial court (the Oakland County Circuit Court), the Michigan Court of Appeals, or the Michigan Supreme Court, although Petitioner did cite *People v. Jenkins* for the general proposition that elected officials could be prosecuted for violating Michigan election laws. Petitioner is raising the issue of equal protection for the very first time in his Petition for a Writ of *Certiorari*. The United States Supreme Court will not review a federal constitutional issue presented in a Petition for a Writ of *Certiorari* from a state court unless that issue was previously presented to the state court. *Cardinale v. Louisiana*, *supra*, at 438, see also *Howell v. Mississippi*, ___ U.S. ___, 125 S. Ct. 856, 858-859, 160 L. Ed. 2d 873 (2005).

COUNTERSTATEMENT OF THE CASE

Ms. Banks must regretfully reject the "Statement of the Case" presented in Petitioner's Petition for a Writ of *Certiorari* in this matter, as it does not fairly present the material facts and proceedings in the case. Ms. Banks has therefore had no choice but to prepare the instant Counterstatement of the Case so the Honorable Justices of the United States Supreme Court will have a fair and balanced picture of the matter before them.

The City of Southfield is a first tier suburb of Detroit, Michigan. It has an elected City Council. As explained *supra*, Mr. Lantz was elected to a two-year term on the Council in November, 1999. Mr. Lantz, for reasons that remain unclear, believed uncounted absentee ballots would have moved him ahead of the candidate who won a four-year

term on the Council. Mr. Lantz retained Petitioner to pursue a lawsuit against Ms. Banks, the City of Southfield Clerk and essentially the City's chief elections officer. Petitioner filed suit against Ms. Banks in Michigan's Oakland County Circuit Court in 1999, where the matter was assigned Oakland County Circuit Court Civil Action No. 1999-019368-AV (the 1999 case). Petitioner, on behalf of Mr. Lantz, alleged that some 180 additional absentee ballots should have been counted in the 1999 election.

In response to the 1999 case, Ms. Banks produced unrefuted affidavits from City of Southfield officials and the local United States Postal Service (USPS) postmaster that established beyond peradventure that the 180 or so ballots in question had *not* reached the City of Southfield prior to the closing of the polls on election day. Under Michigan law, ballots not received by the time the polls closed could not lawfully be counted. MCL § 168.764a. The trial court (that is, the Oakland County Circuit Court, dismissed the 1999 case. The dismissal was affirmed by the Michigan Court of Appeals, and both the Michigan Supreme Court and this Honorable United States Supreme Court declined to review the decision of the Michigan Court of Appeals (and, by implication, the decision of the Oakland County Circuit Court. *Lantz v. Southfield City Clerk*, *supra*.

Prior to the completion of the 1999 case, Petitioner, purportedly acting in his own behalf on not on behalf of his client, Mr. Lantz, filed a MFOIA request with Ms. Banks, asking that

> the records and documents associated with the November 2, 1999, election be made available for my inspection. I am particularly interested in all absentee ballots, which were cast in that election; the ones, which were counted; and the ones which were not counted. In addition, I would like to review all records and data associated with the conduct of this election by your office. What applications for absentee ballots went out? What requests for absentee ballots came

back? What absentee ballots went out. What absentee ballots came back. Copies of this information may be requested.

Several years after the MFOIA was enacted in 1976, the Michigan Legislature became aware that litigants who were disgruntled with discovery in cases with public bodies were utilizing the MFOIA as a substitute. The Legislature therefore amended the MFOIA, now codified as MCL § 15.243(1)(v), which prohibits the use of the MFOIA while litigation is pending. Therefore, Petitioner's 2001 MFOIA request to Ms. Banks was invalid on its face.

Ms. Banks denied Petitioner's MFOIA request on October 31, 2002, noting the following:

- The 1999 case was still pending, so MCL § 15.243(1)(v) applied and barred Petitioner's MFOIA request.
- Disclosure of the information sought in Petitioner's MFOIA request would be an invasion of privacy and therefore impossible under MCL § 15.243(1)(a).
- Inasmuch as disclosure of the information sought in Petitioner's MFOIA request would violate the law of the State of Michigan, it was exempt from disclosure under MCL § 15.243(1)(d).

Petitioner filed the instant lawsuit (the 2001 case) against Ms. Banks shortly after receiving Ms. Banks' October 31, 2001 letter. The City of Southfield is solely located in Oakland County, Michigan, so the 2001 case was filed in the Oakland County Circuit Court.

After receiving Petitioner's Complaint in the 2001 case, Ms. Banks filed a Motion for Summary Disposition under MCR 2.116(C) *et seq*. [essentially, the equivalent of a motion for summary judgment under F.R.Civ.P. 12(b)(6) and F.R.Civ.P. 56]. Ms. Banks argued that, while she was being sued in her capacity as the Clerk for the City of Southfield, the MFOIA provides that suit will be filed only against a "public body". MCL § 15.240(1)(b). Therefore, she was not a proper party to the litigation.

The trial court, the Honorable Nanci J. Grant (Judge Grant) of the Oakland County Circuit Court, heard oral argument on Ms. Banks' Motion on both February 13, 2002, and April 10, 2002. On April 10, 2002, Judge Grant issued an Order (please see "Exhibit A" in the Appendix to this Response) that provided in pertinent part as follows:

1. In view of the fact that a final disposition has been made in Case No. 99-019368-AW [the 1999 case], entitled, *Sidney Lantz v. Nancy Banks*, which represented Defendant's [Ms. Banks, or Respondent] purported basis for the denial of Plaintiff's [Petitioner in the matter now before the United States Supreme Court] Freedom of Information Act request, Defendant shall have ten (10) business days from entry of Order within which to make a response to Plaintiff's Freedom of Information Act request which is the subject matter of this case.
2. In the event Plaintiff is unsatisfied with the response made pursuant to paragraph number one, above, Plaintiff shall, within sixty (60) days of the City's Freedom of Information Act response, as specified in paragraph number one, above, then file an amended complaint with the entitlement changed in the following manner: "Nancy Banks, in her official capacity as Clerk for the City of Southfield, Michigan," shall be dismissed and deleted as a party, and Plaintiff shall substitute as the sole Defendants in the case, "City of Southfield, a Michigan municipal corporation, and the Office of the City Clerk". Following the filing of such amended complaint, Defendant shall have 21 days to respond thereto as provided in the Court rules. Thereafter, this case shall be expedited for trial pursuant to MCLA 15.240(5) [MCL § 15.240(5)] and assigned for trial at the earliest possible date and expedited in every way.

On or about Friday, April 19, 2002, Ms. Banks, through the City of Southfield's MFOIA coordinator, timely provided its response to Petitioner's October 19, 2001

MFOIA request pursuant to the April 10, 2002 Order (*i.e.*, "Exhibit A" in the Appendix) of Judge Grant. Please see "Exhibit B" in the Appendix to this Response. Ms. Banks made several boxes of material requested by Petitioner in his MFOIA request available for inspection and copying. Petitioner never bothered, however, to inspect, much less copy, any of the material produced. Please see "Exhibit C" in the Appendix to this Response.

The only records requested by Petitioner in his 2001 MFOIA not made available for inspection and copying on April 19, 2002 were the absentee ballots, still in their sealed envelopes, that had been the subject of the 1999 case. The propriety of disclosing such absentee ballots pursuant to a MFOIA request presented a matter of first impression in Michigan, both in terms of whether the disclosure would amount to an invasion of the privacy of the electors who submitted such ballots, and whether the disclosure would be a violation of state election law. Rather than denying Petitioner's MFOIA request for the absentee ballots, or risking the criminal penalties applicable to an improper surrender of the absentee ballots, Ms. Banks sought the guidance of Judge Grant on whether to make such disclosure. More specifically, Ms. Banks filed a Motion for Judicial Guidance with the Oakland County Circuit Court and Judge Grant contemporaneously with its April 19, 2002 response to Petitioner's October 19, 2001 MFOIA request.

The Motion for Judicial Guidance was an attempt by Ms. Banks to obtain an expeditious and authoritative resolution of the legal issues presented by Petitioner's MFOIA request. Petitioner, however, objected to Ms. Banks' Motion for Judicial Guidance.

On July 17, 2002, Judge Grant issued the following Order (please see "Exhibit D" in the Appendix):

> This matter having come on to be heard in open court on May 29, 2002, on Plaintiff's Motion to Find Defendant in Contempt, Motion to Strike Defendant's Motion for Judicial Guidance Relative to the Release of Absentee Ballots, and the parties having resolved the

issues therein based upon the order set forth below, and the Court being fully advised in the premises:

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. Upon request of Plaintiff [*i.e.*, Petitioner here], the Court hereby approves the withdrawal of Plaintiff's Motion to Find Defendant [Respondent, or Ms. Banks, here] in Contempt, Motion to Strike Defendant's Motion for Judicial Guidance Relative to the Release of Absentee Ballots.

2. The Court shall proceed with the consideration of Defendant's Motion for Judicial Guidance Relative to the Release of Absentee Ballots. . . .

3. Paragraph 2 of the Order Resolving Defendant's Motion for Summary Disposition and Plaintiff's Motion for Expedited Trial, dated April 10, 2002 shall be amended to read as follows:

> In the event Plaintiff continues to feel aggrieved following the order of the Court determining Defendant's Motion for Judicial Guidance Relative to the Release of Absentee Ballots, Plaintiff may, within thirty (30) days of the date of such Order, file an amended complaint with the entitlement changed in the following manner: "Nancy Banks, in her official capacity as Clerk for the City of Southfield, Michigan," shall be dismissed and deleted as a party, and Plaintiff shall substitute as the sole Defendants in the case, "City of Southfield, a Michigan municipal corporation, and the Office of the City Clerk". Following the filing of such amended complaint, Defendant shall have 21 days to respond thereto as provided in the Court Rules. Thereafter, this case shall be expedited for trial pursuant to MCLA 15.240(5) [MCL § 15.240(5)] and assigned for trial at the earliest possible date and expedited in every way.

All other provisions of such April 10, 2002 Order shall remain as filed.

After taking Defendant's Motion for Judicial Guidance under advisement, the Circuit Court entered Orders and

Opinions on October 21, 2002 and February 28, 2003 ("Exhibit E" and Exhibit F" in the Appendix to this Response respectively), holding that Petitioner was permitted to examine the absentee ballots themselves, but based on the issue of the electors' right to privacy, the Petitioner would not be allowed to examine the ballot jackets. The latter contained personal information about the electors, while the former did not. Interestingly, it is the position of the Michigan Department of Elections that ballots received after the close of polls are *not* subject to inspection or examination. Please see "Exhibit G" in the Appendix to this Response.

Under the Orders entered in the 2001 case, if Petitioner was aggrieved by the response to his October 19, 2001 MFOIA request, he had until March 30, 2003 to file an Amended Complaint outlining his grievance. No such Amended Complaint was ever filed. Instead, Petitioner filed a Motion for Trial on or about May 15, 2003. Ms. Banks responding by filing her own Motion to declare the February 28, 2003 Opinion and Order of Judge Grant the final order in the case. Under the Michigan Court Rules of 1985, that would close the case in the Oakland County Circuit Court and allow Petitioner to proceed with an appeal as of right to the Michigan Court of Appeals. MCR 7.202(6)(a)(1) and MCR 7.203(A)(1).

Both Petitioner's Motion and Ms. Banks' Motion were heard by Judge Grant on August 20, 2003. Petitioner admitted that he had never inspected the election records Ms. Banks had made available for inspection and copying. Please see "Exhibit H" in the Appendix to this Response. Petitioner had also never amended his Complaint in the 2001 case to replace Ms. Banks by the City of Southfield and the Office of the City Clerk of the City of Southfield. Accordingly, Judge Grant issued an Opinion and Order on October 3, 2003 that dismissed the 2001 case, albeit without prejudice.

Petitioner pursued an appeal as of right to the Michigan Court of Appeals, as permitted under MCR 7.203(A)(1). On July 27, 2004, the Court of Appeals, the Honorable

Richard Griffin (now a Judge of the United States Court of Appeals for the Sixth Circuit), the Honorable Mark Cavanagh and the Honorable Karen Fort Hood, issued a *per curiam*, unpublished opinion which affirmed Judge Grant in all respects. The pertinent part of the Court of Appeals' decision and opinion is presented below for the convenience of this Honorable United States Supreme Court.

> Plaintiff appeals as of right the trial court's orders denying his motions for trial and an order to show cause, and granting defendant's motion for confirmation of final order in this Freedom of Information Act (FOIA) case. Defendant cross appeals. We affirm.
>
> Plaintiff claims that the trial court erred in denying his motion for trial, dismissing the bulk of his case, and subsequently granting defendant's motion for final judgment [fn 1]. We disagree.
>
> The primary reason the trial court denied the motion for trial and dismissed plaintiff's case is because he failed to make any progress on this side of the case. Defendant made a significant amount of information available to plaintiff. According to defendant's response, this material was everything plaintiff asked for except the absentee ballots and the ballot jackets. Despite over a year and a half passing, plaintiff never bothered to look at the material and determine what materials were provided. Dismissal of a suit for want of prosecution is a question left to the sound

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fn 1 The central issue of the case is whether certain absentee ballots and ballot jackets can be released by defendant pursuant to plaintiff's FOIA request. The trial court dealt with this issue in a motion for judicial guidance brought by defendant. The second issue involves the release of collateral material to the ballots sought in the FOIA request. It is the second issue that the court dismissed. The court dismissed plaintiff's case on all issues except those dealt with in the motion for judicial guidance.

discretion of the trial court. "Appellate review is restricted to determining whether there is any justification in the record for the trial court's ruling." *Eliason Corporation, Inc. v. Department of Labor*, 133 Mich. App. 200, 203, 348 N.W.2d 315 (1984). Given these facts, justification existed for the trial court's ruling, and the trial court did not abuse its discretion in dismissing plaintiff's claim.

Further, dismissal was appropriate in light of a previous court order that directed defendant to issue a new response to plaintiff's FOIA request. The order also indicated that if plaintiff was not satisfied with this response, he was to amend his complaint removing defendant as a party and replacing her with the City of Southfield. Plaintiff failed to amend his complaint as mandated by this order. Although the trial court waited longer than the time allotted by the order, the dismissal was still proper and consistent with the order. Therefore, the trial court did not abuse its discretion in dismissing plaintiff's claims and subsequently did not err in denying plaintiff's motion for trial and granting defendant's motion for final judgment.

Next, plaintiff claims that the trial court erred in denying his motion to show cause why defendant should not be held in contempt of court. We disagree. The decision whether to issue an order of contempt is left to the sound discretion of the trial court and is reviewed for an abuse of discretion. *Schoensee v. Bennett*, 228 Mich. App. 305, 316, 577 N.W.2d 915 (1998).

Plaintiff brought the show cause motion alleging defendant had violated a court order prohibiting the destruction of the absentee ballots and ballot jackets at issue in this case. MCR 3.606 governs the initiation of contempt proceedings for occurrences outside the immediate presence of the court and provides that proceedings can only be initiated "on a proper showing on *ex parte* motion supported by affidavits." MCR 3.606. MCR 2.119(B) requires affidavits to be made on personal knowledge and state with particularity facts

admissible as evidence. The material offered by plaintiff was not sufficient since it was not based on personal knowledge and was likely inadmissible double hearsay. Therefore, the trial court did not abuse its discretion with regard to the contempt proceedings. See *Schoensee, supra*.

Plaintiff next claims that the trial court's ruling that the absentee ballot jackets were exempt from disclosure under the FOIA was erroneous. We disagree. Whether a public record is exempt from disclosure pursuant to the FOIA is a question of law reviewed *de novo*. *Larry S. Baker, P.C. v. Westland*, 245 Mich. App. 90, 93, 627 N.W.2d 27 (2001).

MCL § 15.243(1) states, in pertinent part:

> A public body may exempt from disclosure as a public record under this act:
>
> (a) Information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

Thus there is a two-part analysis; first, whether the information would be personal in nature and, second, whether disclosure of it is a clearly unwarranted invasion of an individual's privacy. *Larry S. Baker, P.C., supra*. Information is personal in nature if it reveals intimate or embarrassing details of an individual's private life. *Id.*, at 95. The information contained on the ballot jackets themselves does not seem to rise to the level of intimate or embarrassing since it merely includes the voter's name, address, signature, and the signature of any person who assisted him or her – not embarrassing or intimate facts. And defendant does not contend otherwise.

But this Court cannot consider the information contained on the ballot jackets in isolation, we must also consider release of the ballots. The Michigan Constitution, Const. 1963, art. 2, § 4, guarantees the right to a secret ballot in all elections. Such a right cannot be abrogated absent a showing that the voter acted

fraudulently. *Schellenberg v. Rochester Lodge No. 2225 of the Benevolent & Protective Order of Elks*, 228 Mich. App. 20, 29, 577 N.W.2d 163 (1998), quoting *Belcher v. Ann Arbor Mayor*, 402 Mich. 132, 134, 262 N.W.2d 1 (1978). How a person voted is certainly intimate; t' erefore, the information qualifies under the first prong of the test. In fact, release of the person's name along with their ballot and vote may be unconstitutional in the State of Michigan. Const. 1963, art. 2, § 4; *Schellenberg, supra*.

In evaluating whether information falls within the second part of the exemption, this Court must balance the public interest in disclosure against the interest the Legislature intended the exemption to protect. *Kocher v. Department of Treasury*, 241 Mich. App. 378, 382, 615 N.W.2d 767 (2000). The only relevant public interest in disclosure that this Court may weigh is the extent to which disclosure would contribute significantly to the public understanding of the operations and activities of government (which is the core purpose of FOIA). *Id.*, quoting *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 495, 114 S. Ct. 1006, 127 L. Ed. 2d 325 (1994). This important purpose "is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct." *Kocher, supra*, quoting *Mager v. Department of State Police*, 460 Mich. 134, 144-146, 595 N.W.2d 142 (1999). In the typical case where one private citizen is attempting to discover information about another private citizen through the FOIA, the requestor is not truly seeking to shed light on the agency's activities. *Kocher, supra* (further citation omitted).

Plaintiff's inquiry seems to be an attempt to obtain personal information on third parties and not a proper inquest to shed light on governmental activities. This Court has stated that such an attempt is improper. *Id.* at 382-383. The disclosure of this

information would constitute an unwarranted invasion of an individual's privacy. *Id.* Although the ballot jacket information absent the voting record may not fall within the exemption to the FOIA, the release of the information with the individual's vote, as plaintiff requested, would fall within the exemption. The trial court dealt with this issue by limiting the access to one of the two items. The trial court's decision is not contrary to MCL § 15.243(1)(a). We find no error in this solution to the potential problem.

Finally, plaintiff claims that the trial court's decision to dismiss and not release the ballot jackets is contrary to Michigan Election Law. Specifically, plaintiff claims that defendant has violated MCL § 168.760 and MCL § 168.931(1)(h) by not turning over the information. First, MCL § 168.760 does not require defendant to turn over the absentee ballot jackets as plaintiff claims. It merely requires defendant to keep a list of absentee ballot applications and such things as the date the ballot was received. Plaintiff does not contend that defendant refused him access to such a list. Therefore, MCL § 168.760 does not apply to this case.

Next, MCL § 168.931(1)(h) states:

> A person shall not willfully fail to perform a duty imposed upon that person by this act, or disobey a lawful instruction or order of the secretary of state as chief state election officer or of a board of county election commissioners, board of city election commissioners, or board of inspectors of election.

There is no contention that defendant disobeyed an instruction of any of the individuals listed in the statute. Plaintiff only claims that defendant failed to perform a duty under the act by not turning over the ballot jackets. But as concluded above, the trial court's decision was not erroneous. Therefore, defendant did not fail to perform a duty and MCL § 168.931(1)(h) does not apply.

> Plaintiff asserts on appeal that if the ballots and the ballot jackets cannot be released together, he would prefer the ballot jackets rather than the ballots. Plaintiff did not raise this issue below and did not ask for such relief from the trial court. This Court need not address an issue raised for the first time on appeal, as it is not properly preserved for appellate review. *FMB First National Bank v. Bailey*, 232 Mich. App. 711, 718, 591 N.W.2d 676 (1998).

Petitioner subsequently sought discretionary review of the decision of the Michigan Court of Appeals in the Michigan Supreme Court, pursuant to the provisions of MCR 7.302 *et seq*. The Michigan Supreme Court unanimously denied leave to appeal in an Order entered by that forum on February 28, 2005. Reconsideration of Petitioner's request for leave to appeal was subsequently denied by the Michigan Supreme Court, also entered unanimously, on July 8, 2005.

While it is acknowledged that Petitioner did cite the case of *People v. Jenkins*, *supra* in both his filings with the Michigan Court of Appeals and the Michigan Supreme Court, at no time did he suggest that the actions of the Oakland County Circuit Court in the 2001 case constituted a violation of the United States Constitution, specifically the due process and equal protection provisions of the 14th Amendment to the Constitution. As will be shown *infra*, *People v. Jenkins* was a criminal case that has about as much in common with the 2001 case and Petitioner's Petition for a Writ of *Certiorari* as a strawberry does with a nuclear submarine.

Petitioner's Petition for a Writ of *Certiorari* to the Michigan Court of Appeals with respect to its July 27, 2004 decision and opinion in the 2001 case followed the refusal of the Michigan Supreme Court to review the decision of the Michigan Court of Appeals. The instant document is Ms. Banks' Response to Petitioner's Petition.

ARGUMENT

The United States Supreme Court should not review a decision of a state's intermediate appellate court to affirm a state trial court's decision to summarily dismiss a plaintiff's state-based freedom of information lawsuit, when the information sought by the plaintiff would have revealed both the identity of the voter and how he or she had voted in a particular election.

I. *People v. Jenkins*, a criminal case brought by the State of Michigan, has no application whatsoever to a MFOIA case brought by a private citizen.

It would be fair to say that Petitioner's argument for the granting of his Petition for a Writ of *Certiorari* is, for all intents and purposes, based on *People v. Jenkins*. The following is extracted directly from the opinion of the Michigan Court of Appeals, presented here for the convenience of the Honorable Justices of the United States Supreme Court and their staff.

> Following a jury trial, defendant was convicted of common-law obstruction of justice for the fabricating of false, inaccurate, or misleading evidence that was material to a grand jury investigation, MCL § 50.505, conspiracy to obstruct justice, MCL § 750.157a, and two Election Law violations by appointing as an assistant to accept delivery of absentee voter ballots one who was a candidate on the ballot and a member of a candidate's immediate family, MCL § 168.764b(3), MCL § 168.931, and willful failure to perform a duty imposed by MCL § 168.760 by refusing to allow public inspection of absentee voter ballot applications or lists, MCL § 168.931(1)(h). On his convictions for obstruction of justice and conspiracy to obstruct justice, the trial court sentenced defendant to concurrent terms of fifteen months to five years in prison. The convictions for violations of the Election Law and for failure to perform a duty resulted in sentences of

ninety days in prison. Defendant appeals as of right. We affirm.

I. Facts and Procedural Background

Defendant was a resident of Buena Vista Township in Saginaw County, where he held the office of Buena Vista Township Clerk. Defendant's convictions arose out of a grand jury investigation into alleged Election Law violations involving the August 6, 1996, primary election in Saginaw County and defendant's appointment of Robert Woods, Jr. (Woods), a Saginaw County commissioner, to the position of election assistant despite the fact that Woods and his brother, James Woods, a township trustee for Buena Vista Township, both faced reelection and appeared on the ballot for their respective positions. Woods' candidacy for reelection was unopposed; however, James Woods was opposed by another candidate.

On August 1, 1996, the Michigan State Police received a number of complaints about possible voter tampering in certain communities in Saginaw County, including Buena Vista Township. These complaints arose after more than two hundred envelopes and absentee voter applications had been mailed from Lansing and received by the Saginaw City Clerk. The police department began a prompt investigation of the complaints because the primary election was to be held on August 6, 1996.

* * *

A one-man grand jury proceeding commenced on September 19, 1996, before the Honorable Leopold Borrello, at which defendant testified, among other things, that he appointed Woods as an assistant in the election process. In response to this testimony, which was the first time the officers became aware that an additional person had been appointed to collect absentee voter applications and ballots, Investigator Charles Brown of the Saginaw County Prosecutor's Office asked Woods, who was sequestered in the jury room, whether he had an election card authorizing him to receive ballots. Woods produced an election card, which Brown presented to the

grand jury. Defendant then continued his grand jury testimony, indicating that he administered the oath appointing Woods to collect absentee ballots on July 9, 1996, and that an oath certificate was filed in the clerk's office verifying the event.

At approximately 11:30 a.m., defendant requested a bathroom break, which lasted about fifteen minutes. After the grand jury proceeding resumed, the grand juror asked defendant to contact defendant's office to determine whether the oath certificate was available for police officers to retrieve. The proceeding was then adjourned for lunch and to allow defendant to call his office.

During the lunch recess of the grand jury proceeding on October 31, 1996, Lieutenant Dougovito obtained a subpoena for the Woods oath certificate and went to the clerk's office to obtain the document. He arrived between 12:15 and 12:20 p.m. and was met by King and Winbush. King informed the officer that the document was available and pointed to the top tray of an in-out basket that contained only one document, the oath certificate. The unsigned oath certificate was dated July 9, 1996. When the officer asked King when the document was prepared, King looked to a typewriter and then responded "whatever date is on the document is when it was produced."

* * *

At trial . . . the prosecution presented testimony from Winbush that King received a telephone call from defendant on October 31, 1996, at around 11:30 a.m., which lasted about five minutes. Winbush indicated that King usually took her lunch break out of the office between 11:00 a.m. and 12:20 p.m., but on that day, she was taking her lunch break in the office. After the call, King left her office, went to a drawer by the typewriter, removed a document, began typing on the document, and then entered defendant's office when she finished. Winbush did not notice what King did with the document, but noted that King's behavior was out of character, because King usually did not do any work during her lunch break.

Winbush further testified that, about five or ten minutes later, defendant called the office again and asked to speak with King. King spoke briefly with defendant and then went into the storage room. Winbush testified that no one other than King used the typewriter that day and that she did not recall seeing a document appointing Woods to the office of deputy registrar/elections officer before that day. She further stated that the only persons authorized to work with absentee voter materials were herself, defendant, and King. Winbush denied that defendant asked her to type an oath of office document for Woods on October 31, 1996, or any other day.

Michelle Dunkerley, a forensic document examiner with the Michigan State Police, testified that she examined the typewriter, cartridge, and ribbons as well as photocopies and originals of the oath certificate and the election card. Dunkerley determined that the last text on the ribbon was text from the oath certificate and that the certificate was typed using the typewriter between August and October 1996, but that the ribbon did not contain text from the election card, which was dated July 9, 1996.

* * *

Regarding the failure to perform duty charge, defendant testified that the officers requested to have the absentee voter ballots, applications, and poll book, not to view or inspect them, and that he declined their request absent a court order on the basis of advice he received from his attorney. Defendant further testified that he was only asked by the police who was authorized from his office to handle absentee voter materials and that he did not mention Woods because his attorney advised him not to volunteer any additional information. Defendant denied asking King to type an oath certificate during the telephone call he made to her during the grand jury proceeding. Defendant also denied asking King to recreate the document after she indicated it was lost, and denied that he did anything to hinder or obstruct the grand jury investigation.

> Following deliberations, defendant was convicted as charged.

People v. Jenkins, pages 5-9, 13, footnotes omitted. The Michigan Court of Appeals affirmed the conviction in all respects, pointedly noting:

> The evidence in this case showed that defendant created or assisted in the creation of a false, inaccurate, and misleading document that was material to a grand jury investigation. [*Id.*, page 18.]
>
> * * *
>
> The record is clear that defendant denied the officers' request to review the voter applications and lists, and the denial was contrary to the statute. The trial court did not err in finding that defendant committed the charged offense. [*Id.*, page 20.]
>
> * * *
>
> Further, defendant testified during the grand jury proceeding, before King testified, that King witnessed Woods sign the oath certificate and that the document could be found in defendant's office. When asked to produce the document for the court's review, defendant said he could comply. The record shows that a few minutes later, defendant requested a bathroom break, during which time he called King at the township office. When defendant returned from the break, he was informed that police officers were going to the clerk's office to retrieve Woods' oath certificate. Defendant was then asked to contact his office and inform his staff to locate the document because the police were coming for it. The police arrived at the township offices and located Woods' oath certificate in a basket on King's desk, despite the fact that during three prior searches of the township offices by the police, this document was nowhere to be found. Finally, forensic evidence was introduced establishing that the last text typed on the typewriter retrieved from the township offices on October 31, 1996, was the text from Woods' oath of office.

> On this record, we conclude that the prosecutor proved the existence of a conspiracy by a preponderance of the evidence before King's grand jury testimony was introduced. [*Id.*, page 22.]

It is patently obvious to even the most casual observer that the only similarity between *People v. Jenkins* and the case at bar (that is, the 2001 case) is that both had decisions of a Michigan Circuit Court affirmed on appeal by the Michigan Court of Appeals. The differences are equally obvious.

- *People v. Jenkins* was always a criminal case – obstruction of justice, conspiracy to obstruct justice, appointment of an assistant to accept absentee ballots who was himself a candidate and a relative of a candidate, and refusal to allow access to absentee ballot applications and lists. The instant case (the 2001 case) was always a civil case, solely based on the MFOIA and whether Ms. Banks had complied with it.
- *People v. Jenkins* involved a criminal conviction after a full trial on the merits. In the instant matter, Petitioner was given access to all records he requested, but with the sealed absentee ballots being separated from the jackets, the jackets containing personal information and the right to a secret ballot being a fundamental guarantee of the Michigan Constitution of 1963. Petitioner's case was dismissed when Petitioner admitted that he had not done any discovery for more than a year and had never amended his Complaint to reflect the proper party defendants (*i.e.*, the City of Southfield and the Office of the Southfield City Clerk instead of Ms. Banks, Respondent here).
- While the defendant in *People v. Jenkins* had his guilt proved beyond a reasonable doubt, there was not a scintilla of evidence that Ms. Banks had done anything other than fully comply with both the MFOIA and the Order of Judge Grant. When there appeared to be a conflict between the Michigan Constitution and Michigan election law as to the release of information pertaining to the

> identity of absentee ballot electors, Ms. Banks promptly sought guidance from Judge Grant, once that guidance was issued, she promptly followed it.

Now it is true that Ms. Banks is a white female (there is a photograph of her on the City of Southfield's official website), and it *may* be true that the defendant in *People v. Jenkins* was a black male. Mr. Jenkins is referred to as a male in *People v. Jenkins*, but there is no mention of his ethnicity or race. As far as this writer knows, Petitioner is merely engaging in unbridled guess, conjecture and speculation concerning the ethnicity or race of the *Jenkins* defendant. For all that is known from the record, Mr. Jenkins could be of Icelandic descent.

Assuming *arguendo* that the *Jenkins* defendant is a black male and that Ms. Banks is a white female, the question then becomes a giant "So what?" There was no disparate treatment here because the positions or circumstances of the defendants in the two cases were entirely different. The *Jenkins* defendant was accused and convicted of violating specific election laws and in engaging in a criminal conspiracy to obstruct justice by the State of Michigan. In the matter at bar, Petitioner is a private citizen who alleges that Ms. Banks failed to comply with the MFOIA and certain provisions of Michigan's election law. The trial court, Judge Grant, found that Petitioner had failed to pursue his MFOIA case and that Ms. Banks had not violated any Michigan election law. Under these circumstances, it was entirely appropriate that the *Jenkins* defendant was sentenced to prison and Petitioner's case against Ms. Banks dismissed.

Petitioner would have a legitimate 14th Amendment claim if and only if the *Jenkins* defendant and Ms. Banks were in the same position or circumstance, or nearly so. If the *Jenkins* defendant, for example, had been presented with a MFOIA request rather than search warrants and subpoenae, or if Ms. Banks had been the subject of a grand jury investigation, with the same result (that is, the *Jenkins* defendant going to prison and the case against Ms. Banks being dismissed), Petitioner *might* – and only

might – have a theoretical 14th Amendment claim. But the *Jenkins* defendant and Ms. Banks were *never* in anything remotely approaching the same position or circumstance, even by the wildest stretch of the imagination. One proceeding was criminal, the other civil. One resulted in a conviction and the other resulted in a dismissal – because of the inaction of Petitioner in pursuing his MFOIA claim and his complete inability to show any violation of Michigan election law by Ms. Banks.

II. Petitioner never sued the proper party for an action based on MFOIA.

Under the MFOIA, a "public body" must disclose all public records that are not specifically exempt under the Act. MCL § 15.233(1); *Jackson v. Eastern Michigan University Foundation*, 215 Mich. App. 240, 244, 544 N.W.2d 737 (1996). If a "public body" makes a final determination to deny all or a portion of a request, the requesting person may "commence an action in the circuit court to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request." MCL § 15.240(1)(b).

The term "public body" is defined in the Act, at MCL § 15.232(d) as follows:

> (d) "Public body" means any of the following:
>
> (i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.
>
> (ii) An agency, board, commission, or council in the legislative branch of the state government.
>
> (iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.

(iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.

(v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

Plainly, Ms. Banks, Respondent here, was never a "public body". Ms. Banks was an elected official of the City of Southfield, Michigan and therefore not a "public body" under MCL § 15.232(d).

Petitioner was advised of this repeatedly, and in effect told by Judge Grant to amend his Complaint to add the proper parties, specifically the City of Southfield itself and the Office of the Southfield City Clerk. Petitioner failed to do so for reasons best explained, but never explained, by Petitioner himself. Inasmuch as the proper party under the MFOIA has never been before any court in the 2001 case, no real purpose would be served by granting Petitioner's Petition for a Writ of *Certiorari* – it could not have any application to the "proper party" under the MFOIA.

III. Petitioner's failure to file an Amended Complaint curing the numerous defects in his original Complaint was a perfectly legitimate reason for dismissing Petitioner's cause of action.

Judge Grant's April 10, 2002 Order, "Exhibit A" in the Appendix, specifically recognized that Petitioner's initial MFOIA request had been properly rejected: the existence of the ongoing litigation (the 1999 case) being handled by Petitioner. MCL § 15.243(1)(v) precludes the use of the MFOIA to do, in effect, an "end run" around discovery limitations in companion civil litigation. The Order further recognized that, by the date of such Order, the pending litigation had been resolved, and thus, the City should be given the opportunity to respond to Petitioner's MFOIA request.

Judge Grant recognized that whatever response Ms. Banks made to the now-valid MFOIA request might not satisfy Petitioner. Judge Grant therefore gave Petitioner 60 days after Ms. Banks' response to Petitioner's MFOIA request to file an Amended Complaint, outlining specific deficiencies in the response and form the basis for further litigation. Petitioner was also required to amend the caption to reflect the proper defendants and to get Ms. Banks out of the case entirely.

Ms. Banks responded to Petitioner's 2001 MFOIA request on April 19, 2002. The issue of whether the sealed absentee ballots (still sealed because they had arrived at the City of Southfield after the close of the polls in 1999) were to be separated from their jackets (identifying the particular voter) before being disclosed to Petitioner was resolved on February 28, 2003 (please see "Exhibit F" in the Appendix). If any further proceedings were to occur, the burden was on Petitioner to file an Amended Complaint on or before March 30, 2003, setting forth any claims to be litigated between himself and the proper parties. No such Amended Complaint was filed.

MCR 2.111(B) requires a plaintiff to: (1) set forth the facts on which the pleader relies in stating a cause of action, with the specific allegations necessary to reasonably inform the adverse party; and (2) demand the relief the pleader seeks. MCR 2.111(C) requires a responsive pleading. The controversy resulting from such pleadings then joins the issues to be presented for litigation. By not filing an Amended Complaint, Petitioner implicitly conceded there was no dispute between himself and Ms. Banks. If there is no dispute, there is no reason for this forum to grant Petitioner's Petition for a Writ of *Certiorari*.

IV. Petitioner is solely responsible for the dismissal of his cause of action.

The April 10, 2002 Order originally gave Petitioner 60 days after Ms. Banks' response to Petitioner's MFOIA request to file an Amended Complaint. As explained *supra*, Ms. Banks fully complied with the MFOIA request, except

for the issue of whether the sealed ballots could be separated from the jackets which contained personal information about each elector. The ballots, of course, contained no personal information. After Judge Grant ruled that the two had to be separated before being made available to Petitioner, Petitioner was given another 30 days to file an Amended Complaint. Please see "Exhibit D", "Exhibit E" and "Exhibit F" in the Appendix.

The bottom line is that Petitioner had until March 28, 2003 to file an Amended Complaint and proceed with his MFOIA claim. No such Amended Complaint was filed by March 28, 2003 or at any time prior to the outright dismissal of the 2001 case on October 3, 2003. It absolutely boggles the imagination why Petitioner, once Ms. Banks moved to dismiss his case because of Petitioner's failure to file an Amended Complaint, did not file an Amended Complaint but the point is Petitioner opted not to file one and he must live with the consequences. Granting Petitioner's Petition for a Writ of *Certiorari* would, in a way, reward Petitioner for his lack of diligence. This is another reason why the Petition should not be granted.

V. The critical decision by the courts below was that secret ballots must remain secret. This is so fundamental a principle of democracy that it needs no further review by the United States Supreme Court.

The envelopes, or "jackets," in which absentee ballots are sealed in City of Southfield municipal elections contain specific information about the person submitting their ballots therein. A sample ballot was attached to Ms. Bank's Motion for Judicial Guidance in the Oakland County Circuit Court. Such information includes:

- The name of the voter.
- The address of the voter.
- The signature of the voter.
- The date the ballot was returned.
- The precinct and ward numbers of the voter.

The secret ballot has been held to be necessary in order to prevent voter intimidation and election fraud. *Burson v. Freeman*, 504 U.S. 191, 206, 119 L. Ed. 2d 5, 112 S. Ct. 1846 (1992). The secret ballot "represents one's right to vote his or her conscience without fear of retaliation". *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 343, 131 L. Ed. 2d 426, 115 S. Ct. 1511 (1995). The United States Court of Appeals for the Sixth Circuit invalidated a Kentucky ballot access law that required everyone signing candidate petitions to declare that they wanted to vote for the candidate. *Anderson v. Mills*, 664 F.2d 600, 607-609 (6th Cir. 1981).

The information contained on the ballot "jackets" would be valuable information for a person desiring to intimidate voters. Further, the federal Freedom of Information Act (FOIA), which is the basis for the MFOIA, has a personal privacy exemption that is nearly identical to the one in MFOIA. See 5 U.S.C. § 552(b)(6). Federal precedents strongly support the result reached by the Michigan courts in the case at bar.

In *Campaign for Family Farms v. Dan*, 200 F.3d 1180 (8th Cir. 2000), for example, several individual pork producers brought a reverse FOIA suit against the United States Department of Agricultural (USDA) to prevent it from releasing a petition calling for a referendum to eliminate a federally imposed assessment on pork sales. The petition included the names, addresses and telephone numbers of over 19,000 pork producers who signed the petition. The United States Court of Appeals for the Eighth Circuit held the information was exempt from disclosure under the FOIA's privacy exemption.

The similarity of *Campaign* to the instant case is compelling. In *Campaign*, the plaintiffs claimed that the right to privacy under the 1st Amendment to the U.S. Constitution prohibited disclosure. In the instant case, Ms. Banks maintained that Michigan's election law not only prohibited her from revealing the information Petitioner sought, it made it a crime if she did so. The language under both the FOIA and the MFOIA regarding the

personal privacy exemption requires the government to balance the privacy interest of the individual against the public interest in disclosure. Here, the individual's interest in not having his or her vote revealed far outweighs any interest Petitioner has in discovering whose vote was not counted because the absentee ballot arrived too late at the polling station.

Petitioner's client in the 1999 case was spectacularly unsuccessful in challenging the absentee ballots and the election in that case. Therefore, any public interest in the ballots ceased to exist several years ago. Further, Mr. Lantz managed to win reelection in 2001 and 2003, finally winning his sought-for four year term in 2003. Since there is no public interest in disclosure of the absentee ballots, disclosure of them would be a clearly unwarranted invasion of each voter's privacy.

V. Ms. Banks did not destroy any absentee ballots.

Just so there is no doubt about this, Ms. Banks has had absolutely nothing to with the destruction of any of the 180 or so absentee ballots that were at issue in the 1999 case and are at the heart of the instant matter, the 2001 case. To the contrary, the absentee ballots were secured *sua sponte* by Ms. Banks following the 1999 election. Much later, an Order was entered prohibiting their destruction until further order of the Oakland County Circuit Court, but there had been no plans to destroy them in any event.

Despite Ms. Banks' history of retaining the ballots without a requirement to do so and despite the absence of any evidence that even suggested Ms. Banks would willfully or even accidentally disobey a court order, Plaintiff submitted a blatantly improper affidavit – "Exhibit I" in the Appendix – which claimed Ms. Banks had destroyed the ballots. The affidavit was improper because it was not made on personal knowledge and was instead based on guess, conjecture and speculation – indeed, double hearsay. See MCR 2.119(B) for the requirements of a valid affidavit under Michigan law.

Ms. Banks had no choice but to submit her own Affidavit, "Exhibit J" in the Appendix, made on her personal knowledge and therefore completely valid under MCR 2.119(B), which established that, no, she had not destroyed any ballots and that they were still safe and secure in a City of Southfield vault.

Ms. Banks was the target of untruthful and reckless accusations, based upon an inaccurate and egregiously improper affidavit. Petitioner claimed Ms. Banks was in contempt of Court, that Ms. Banks perpetrated a "fraud upon the court and the judicial process," that she had committed an "obstruction of justice," and, that she should be punished for such alleged wrongdoing. This was and is unconscionable.

It is noted that Petitioner is admitted to practice before this United States Supreme Court. The question is: should he remain so, given his conduct in the case at bar.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, Ms. Banks, Respondent here, most respectfully requests this Honorable United States Supreme Court to enter an Order denying Petitioner's Petition for a Writ of *Certiorari* in the above-entitled cause of action.

MICHAEL L. UPDIKE (P 28964)
Counsel of Record
Counsel for Respondent
Member of the Bar of the United States Supreme Court

SECREST WARDLE
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Farmington Hills, Michigan 48333-3040
(248) 851-9500

Dated: November 11, 2005

INDEX TO THE APPENDIX

EXHIBIT A

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

STEPHEN P. KORN,

Plaintiff,

vs.

NANCY BANKS, In her official capacity as Clerk for the City of Southfield, Michigan,

Defendant.

Case No. 01-035929-CZ
Honorable Nanci J. Grant

Monte M. Korn (P16154)
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Gary R. Sanfield (P27984)
Attorney for Plaintiff
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Clinton Township, MI 48038
(810) 228-2000

ORDER RESOLVING [DEFENDANTS /s/ NJG] MOTION FOR SUMMARY DISPOSITION
[AND PLAINTIFFS MOTION FOR EXPEDITED TRIAL /s/NJG]

At a session of said Court held in the Courthouse City of Pontiac, State of Michigan on Apr 10 2002

PRESENT: THE HONORABLE NANCI J. GRANT

This matter having come on to be heard in open court on February 13, 2002, on Defendant's Motion for Summary Disposition [and Plaintiff's motion for expedited trial on 4-10-02 /s/ NJG] and the Court having taken a recess from the arguments on such Motion, and the parties having resolved the issues therein based upon the order set forth below, and the Court being fully advised in the premises:

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. In view of the fact that a final disposition has been made in Case No. 99-019368-AW entitled, *Sidney Lantz v. Nancy Banks*, which represented [Defendant's purported /s/ NJG] basis for the denial of Plaintiff's Freedom of Information Act request, Defendant shall have ten (10) business days [from entry of order /s/ NJG] within which to make a [word omitted /s/ NJG] response to Plaintiff's Freedom of Information Act request which is the subject matter of this case.

[Paragraph omitted /s/ NJG]

[2. /s/ NJG] In the event Plaintiff is unsatisfied with the response made pursuant to paragraph number one, above, Plaintiff shall, within sixty (60) days of the city's Freedom of Information Act response, as specified in paragraph number one, above, then file an amended complaint with the entitlement changed in the following manner: "Nancy Banks, in her official capacity as Clerk of the City of Southfield, Michigan, shall be dismissed and deleted as a party, and Plaintiff shall substitute as the sole Defendants in the case, "City of Southfield, a Michigan municipal corporation, and the Office of the City

Clerk". Following the filing of such amended complaint, [Defendant shall have 21 days to respond thereto as provided in the court rules. Thereafter, this case shall be expedited for trial pursuant to MCLA 15.240(5) and assigned for trial at the earliest possible date and expedited in every way. /s/ NJG]

NANCI J. GRANT
CIRCUIT JUDGE
Circuit Court Judge

APPROVED FOR EN RY:

/s/ Gary R. Sanfield
Gary R. Sanfield (P27984)
Attorney for Plaintiff

/s/ Gerald A. Fisher
Gerald A. Fisher (P13462)
Attorney for Defendant

/s/ Stephen P. Korn
Stephen P. Korn
Plaintiff

EXHIBIT B

[SEAL]

City of Southfield
[Names Omitted In Printing]

26000 Evergreen Road • P.O. Box 2055 •
Southfield, MI 48037-1055

Friday April 19, 2002

Stephen P. Korn
Stephen P. Korn & Associates, P.L.C.
30800 Van Dyke – Suite 206
Warren, MI – 48093

Re: Freedom of Information Request

Dear Mr. Korn:

On October 23, 2001 the City of Southfield received your request, pursuant to the Freedom of Information Act, to inspect public records associated with the November 2, 1999 election. On October 31, 2001, the City of Southfield sent you a denial of your request that was based on exemptions embodied in Section 13 (MCL 15.243) of the Act.

On November 2, 2001 you brought an action in Oakland County Circuit Court pursuant to Section 10 (MCL 15.240) of the Act. As a final disposition had been made in the collateral case of *Sidney Lantz v Nancy Banks* (99-019368-AW). Judge Grant entered an order on April 10, 2002 granting the City of Southfield ten business days to respond to your Freedom of Information Act request.

In your letter, you stated:

> This letter is written to request that the records and documents associated with the November 2,

> 1999 election be made available for my inspection. I am particularly interested in all absentee ballots, which were cast in that election; the ones, which were counted; and the ones that were not counted. In addition, I would like to review all records and data associated with the conduct of this election by your office. What applications for absentee ballots went out? What requests for absentee ballots came back? What absentee ballots went out? What absentee ballots came back?

Your request to inspect public records has been carefully reviewed. Please be advised that your request is granted with one exception. Your request to inspect those absentee ballots within sealed envelopes not counted in the 1999 election because they were received after the close of the polls is not being granted at this time. The City of Southfield believes these sealed absentee ballots are exempt from disclosure for the following reasons:

1. Information included in these records is of a personal nature, and public disclosure of the information would constitute a clearly unwarranted invasion of an individual's constitutional and statutory right of privacy. [MCL 15.243(1)(a)]

2. Information included in these records is specifically described and exempted from disclosure by law, to wit: the Constitution and the Election Code. [MCL 15.243(1)(d)]

3. Disclosure of these records would violate state law, possibly subjecting you and others to criminal sanctions.

A motion seeking guidance from Judge Grant for the disposition of these absentee ballots has been filed with

the court, and a copy of that motion accompanies this letter for your reference.

With respect to those records that your request to inspect has been granted, please contact the City Clerk's Office should you wish to make arrangements to review and inspect those records and documents.

Sincerely,

/s/ Susan D. Silva
Susan D. Silva
Freedom of Information
Coordinator
City of Southfield

EXHIBIT C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

STEPHEN P. KORN,

Plaintiff,

v

Case No.
2001-035929-CZ

NANCY BANKS in her official capacity as Clerk for the city of Southfield, Michigan,

Defendant. /

MOTION

BEFORE THE HONORABLE NANCI J. GRANT

JUDGE OF CIRCUIT COURT

Wednesday – August 20, 2003

APPEARANCES:

GARY R. SANFIELD

On behalf of the Plaintiff

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Clinton Township, MI 48038

GERALD A. FISHER

On behalf of the Defendant

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PO Box 3040

Farmington Hills, MI 48333-3040

Kathleen A. Milam – CSR-1088 – Official Reporter

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[7] MR. SANFIELD: Judge, we put in our –

THE COURT: With all due respect, Mr. Korn.

MR. KORN: Thank you.

MR. SANFIELD: The reason were asking for the trial, Judge, I will make it clear – there's about six good points. What documents there are for production, what documents were destroyed and the circumstances surrounding the destruction, –

THE COURT: This sounds like discovery to me which you haven't conducted.

MR. SANFIELD: That's not – I don't think that's entirely correct, Judge.

THE COURT: Have you gone over and looked at what they do have for you right now?

MR. SANFIELD: No, but I will do that if you feel that's appropriate prior to –

THE COURT: Have you – I am back on this, Mr. Sanfield: We are talking practically now. You are in a civil case of which you want documents. You choose not to go look, at the documents and then you say to the Court I want a trial date but I'm not going to go look at those documents until you tell me to go look at the documents?

MR. SANFIELD: Judge, there's been an admission, Judge, that a lot of documents were

* * *

EXHIBIT D

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

STEPHEN P. KORN,

Plaintiff,

vs.

NANCY BANKS,
In her official capacity as
Clerk for the City of
Southfield, Michigan,

Defendant.

Case No. 01-035929-CZ
Honorable Nanci J. Grant

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ORDER RELATIVE TO PLAINTIFF'S MOTION TO FIND DEFENDANT IN CONTEMPT MOTION TO STRIKE DEFENDANT'S MOTION FOR JUDICIAL GUIDANCE RELATIVE TO THE RELEASE OF ABSENTEE BALLOTS

(Filed Jul. 17, 2002)

At a session of said Court held in the Courthouse City of Pontiac, State of Michigan on JUL 16 2002

PRESENT: THE HONORABLE NANCI J. GRANT

This matter having come on to be heard in open court on May 29, 2002, on Defendant's Motion to Find Defendant in Contempt, Motion to Strike Defendant's Motion for Judicial Guidance Relative to the Release of Absentee Ballots, and the parties having resolved the issues therein based upon the order set forth below, and the Court being fully advised in the premises:

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. Upon request of Plaintiff, the Court hereby approves the withdrawal of Plaintiff's Motion to Find Defendant in Contempt, Motion to Strike Defendant's Motion for Judicial Guidance Relative to the Release of Absentee Ballots.

2. The Court shall proceed with the consideration of Defendant's Motion for Judicial Guidance Relative to the Release of Absentee Ballots, based upon the following schedule: Plaintiff shall file an Answer and Brief to such Motion on or before July 17, 2002; Defendant shall file a Reply Brief on or before July 31, 2002; and, the Motion shall be scheduled for hearing and argument before the Court on August 7, 2002.

3. Paragraph 2 of the Order Resolving Defendant's Motion for Summary Disposition and Plaintiff's Motion for Expedited Trial, dated April 10, 2002 shall be amended to read as follows:

> In the event Plaintiff continues to feel aggrieved following the order of the Court determining Defendant's Motion for Judicial Guidance Relative to ~~the~~ Release of Absentee Ballots, Plaintiff may, within thirty (30) days of the date of such Order", file an amended complaint with the entitlement changed in the following manner: "Nancy Banks, in her official capacity as Clerk for the City of Southfield, Michigan, shall be dismissed and deleted as a party, and Plaintiff shall substitute as the sole Defendants in the case, "City of Southfield, a Michigan municipal corporation, and the Office of the City Clerk". Following the filing of such amended complaint, Defendant shall have 21 days to respond thereto as provided in the Court Rules. Thereafter, this case shall be expedited for trial pursuant to MCLA 15.240(5) and assigned for trial at the earliest possible date and expedited in every way.

All other provisions of such April 10, 2002 Order shall remain as filed.

Nanci J. Grant
NANCI J. GRANT
Circuit Court Judge

APPROVED FOR ENTRY:

/s/ Gary R. Sanfield
Gary R. Sanfield (P27984)
Attorney for Plaintiff

/s/ Gerald A. Fisher
Gerald A. Fisher (P13462)
Attorney for Defendant

EXHIBIT E

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF OAKLAND

STEPHEN P. KORN,

Plaintiff,

-v-

NANCY BANKS, in her official capacity as Clerk for the City of Southfield, Michigan,

Defendant. /

Case Number
2001-035929-CZ
Honorable
Nanci J. Grant

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ORDER AND OPINION

At a session of said Court, held in the Courthouse in the City of Pontiac,

County of Oakland, State of Michigan
on the 21st day of October, 2002.

PRESENT: THE HONORABLE NANCI J. GRANT, CIRCUIT JUDGE

This matter, having come before the Court on Defendant's motion for judicial guidance, said motion is granted in part and denied in part.

This case arises out of a dispute over the results of a November 1999 election in the City of Southfield. One of the candidates discovered that the City had received 180 absentee ballots on election day, but had not opened or counted them because they arrived after the polls had closed. Thus, the candidate filed suit seeking an order compelling the votes to be considered in the election. That suit was dismissed and that ruling was affirmed on appeal.

Sometime thereafter, Stephen Korn filed a request with the City pursuant to the Freedom of Information Act (FOIA) seeking, among other things, to examine "all absentee ballots" cast in the November 1999 election.[1] In particular, Plaintiff sought to examine both the ballots

[1] The complete request reads as follows:

This letter is written to request that the records and documents associated with the November 2, 1999, election be made available for my inspection. I am particularly interested in all absentee ballots, which were cast in that election; the ones, which were counted; and the ones which were not counted. In addition, I would like to review all records and data associated with the conduct of this election by your office. What applications for absentee ballots went out? What requests for absentee ballots came back? What absentee ballots came back. Copies of this information may be requested.

themselves and the ballot jackets that identify the voter. The City provided some information, but refused to let him examine the uncounted absentee ballots. Thus, Korn filed the current action seeking relief under FOIA.

The City has provided some materials pursuant to the request, but did not turn over or allow Plaintiff to inspect the unopened absentee ballots. Instead, the City filed the current "motion for judicial guidance" regarding the absentee ballots. This is essentially a summary disposition motion regarding the absentee ballots, as the City seeks a ruling that Plaintiff is not entitled access to the ballots pursuant to FOIA.

In support, the City first points out that FOIA does not apply to "records or information specifically described and exempted from disclosure by statute." MCL 15.233(1)(D). The City then cites MCL 168.764(a)(5), which provides that it is "illegal . . . for a person other than the absentee voter . . . to be in possession of a voted or unvoted absentee ballot." Similarly, MCL 168.932(f) provides that it is a felony for an unauthorized person to "possess an absentee voter ballot mailed or delivered to another person." The City also cites MCL 168.932(g), which prohibits a person not involved in the counting of ballots from opening an envelope containing an absentee ballot. Next, the City notes that subsection (d) of MCL 168.932 prohibits disclosure of "the name of any candidate voted for by any elector." The provisions of § 932 are particularly significant in light of the Michigan Constitution's requirement that the Legislature "enact laws to preserve the purity of elections [and] the secrecy of the ballot." Const 1963, art 2, § 4. Finally, the City notes that FOIA does not apply if disclosure of information would constitute a clearly unwarranted invasion of an individual's privacy. MCL

15.233(1)(a). These provisions, the City argues, cannot be reconciled with Plaintiff's FOIA request. Thus, the request must be denied.

The Court disagrees, at least with respect to Plaintiff's request to examine the ballots themselves (exclusive of the ballot jackets). First, the Court does not believe that allowing Plaintiff to inspect the ballots would entail that Plaintiff be given "possession" of the ballots for purposes of MCL 168.764(a)(5) and MCL 169.932(f), or authority to "open" them for purposes of MCL 168.932. Nor does the Court see how such an inspection would implicate any of the privacy concerns inherent in MCL 168.932(d), FOIA, or the Michigan Constitution, as the ballots themselves provide no information about the voter, but only identify the candidate for whom the vote was cast. Therefore, Defendant cannot resist Plaintiff's request to inspect the ballots on these grounds, and the motion is denied with respect to the ballots.

The Court believes, however, that privacy concerns are implicated in Plaintiff's request to inspect the ballot jackets. First, the jackets identify the voter and, therefore, there is a concern that inspection would entail disclosure how each voter voted. Second, even if the ballots and jackets can be separated, there are still a relatively small number of ballots. This creates the possibility that, in the event of a lopsided tally, each voter's choice would be constructively disclosed. To be sure, such a result is not certain and, if this had been an action challenging the results of the election, would likely give way to the need to identify each voter and each vote. This action, however, is not a challenge to the election results (such an action having already been dismissed), but is merely a request under FOIA. As that statute explicitly identifies privacy of

individuals as a significant concern, the Court believes that voter privacy prevails with respect to the ballot jackets. Therefore, Defendant's motion is granted with respect to the jackets.

Defendant next cites administrative rules promulgated pursuant to MCL 168.790. Specifically, Rule 20(19) provides that: "Ballots shall not be released for examination, review, or research unless prior approval is obtained by the board of canvassers." The City notes that no such approval has been sought or obtained in this case, thereby precluding examination of the ballots.

In response, Plaintiff correctly points out that the authority of the board of state canvassers is limited to "canvass[ing] the returns and determin[ing] the result of all elections for electors of president and vice president of the United States, state officers, United States senators, representatives in congress, circuit judges, state senators and representatives elected by a district that is located in more than 1 county, and other officers as required by law." MCL 168.841. The election at issue in this case, however, was for city counsel and did not involve any of the aforementioned offices. Therefore, the board of state canvassers was not involved in canvassing the returns and determining the results. This is significant because the rule Defendant seeks to invoke comes into play only "after . . . the final determination of the board of canvassers with respect to the election." If the board of canvassers was not involved in making a final determination with respect to this election, then it stands to reason that the administrative rules promulgated to enable the board to make such determinations would not be implicated and the board's approval would not be necessary before releasing ballots

for examination. If so, Defendant cannot invoke this rule as a defense to Plaintiff's FOIA request.

In light of the foregoing, the Court finds that Defendant's motion does not defeat Plaintiff's request with respect to the ballots themselves, but does defeat Plaintiff's request to examine the ballot jackets. Therefore, the motion is granted to that extent. In so ruling, the Court also acknowledges the likelihood of appellate review of this decision. While normally not an important consideration, this possibility is of significant concern in a case such as this where a grant of relief cannot be undone. Thus, the Court shall stay enforcement of this ruling long enough to allow the parties to appeal. If no appeal is filed, then neither party may petition the Court for a final judgment.

It is so ordered.

/s/ [Illegible]
NANCI J. GRANT,
Circuit Judge

By: /s/ [Illegible]
Deputy

EXHIBIT F

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF OAKLAND

STEPHEN P. KORN,

Plaintiff,

-v-

NANCY BANKS, in her official capacity as Clerk for the City of Southfield, Michigan,

Defendant. /

Case Number 2001-035929-CZ
Honorable Nanci J. Grant

Monte M. Korn (P16154)
Attorney for Plaintiff
30800 VanDyke, Suite 204
Warren, MI 48093

Gary R. Sanfield (P27984)
Attorney for Plaintiff
42645 Garfield, Suite 101
Clinton Township, MI 48038

Gerald A. Fisher (P13462)
Attorney for Defendant
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040

ORDER AND OPINION

At a session of said Court, held in the Courthouse in the City of Pontiac, County of Oakland, State of Michigan on the 28th day of February, 2003.

PRESENT: THE HONORABLE NANCI J. GRANT, CIRCUIT JUDGE

This matter comes before the Court on the parties' cross motions for reconsideration. Said motions are DENIED because the Court does not believe that palpable error occurred in its initial ruling.

The Court also believes that there is a significant likelihood that the parties will appeal the previous ruling. This is significant because the relief granted in the initial ruling (disclosure to Plaintiff of certain portions of certain absentee ballots) cannot be "undone" if the previous ruling is later reversed or modified. Thus, the Court shall not enforce the relief granted by its previous ruling until the parties have an opportunity to file an appeal as of right (i.e., until the time for taking an appeal of right has passed). Moreover, if such an appeal is filed, then the Court shall continue to hold relief in abeyance until the Court of Appeals reviews the decision.

It is so ordered.

/s/ [Illegible]
NANCI J. GRANT,
Circuit Judge

By: /s/ KM Morton
Deputy

EXHIBIT G

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF OAKLAND

AFFIDAVIT OF BRADLEY S. WITTMAN

Bradley S. Wittman, being first duly sworn, deposes and says as follows:

1. He currently serves as the Director of Information Services for the Michigan Department of State Bureau of Elections.

2. The Rules promulgated to administer electronic voting systems, R 168.790(19), provide that punch card ballots "shall not be released for examination, review or research unless prior approval is obtained by the board of state canvassers."

3. It is the Bureau's position that the R 168.790(19) applies to all punch card ballots issued for any election conducted in Michigan including elections where there are no federal or state offices appearing on the ballot.

4. Michigan election law, MCL 168.765(4), provides that if an absent voter ballot returned by a voter is received by the clerk after the close of the polls, "the clerk shall plainly mark the envelope with the time and date of receipt and shall file the envelope in his or her office. . . ."

5. It is the Bureau's position that punch card absent voter ballots returned after the close of the polls must remain sealed in their return envelopes during the applicable retention period and that the manner in which such ballots have been voted is not subject to disclosure under the allowance provided under

R168.790(19) for the release of ballots for "examination, review or research."

6. If called as a witness, Affiant could competently testify to the matter set forth herein.

Affiant further sayeth not.

/s/ [Illegible]
Bradley S. Wittman

Subscribed and sworn to before
me this 1st day of November, 2002.

/s/ Amy Shell
Amy Shell, Notary Public
Eaton County, Acting in Ingham County, Michigan
My Commission Expires: March 13, 2006

EXHIBIT H

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

STEPHEN P. KORN,

Plaintiff,

v

NANCY BANKS in her official capacity as Clerk for the city of Southfield, Michigan,

Defendant. /

Case No.
2001-035929-CZ

MOTION

BEFORE THE HONORABLE NANCI J. GRANT

JUDGE OF CIRCUIT COURT

Wednesday – August 20, 2003

APPEARANCES:

GARY R. SANFIELD

On behalf of the Plaintiff

42645 Garfield, Suite 101

Clinton Township, MI 48038

GERALD A. FISHER

On behalf of the Defendant

30903 Northwestern Highway

PO Box 3040

Farmington Hills, MI 48333-3040

Kathleen A. Milam – CSR-1088 – Official Reporter

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[3] Pontiac, Michigan

Wednesday – August 20, 2003

At about 11:02 a.m.

* * *

THE CLERK: Your Honor, calling Docket Number 8, Korn v Banks.

MR. SANFIELD: Good morning, Judge. Your Honor, Gary Sanfield on behalf of the Plaintiff. There are two motions before the Court.

THE COURT: Can I ask questions?

MR. SANFIELD: Pardon me?

THE COURT: I have questions.

MR. SANFIELD: Okay.

THE COURT: Okay. First to – I guess first for Mr. Fisher: Other than the ballots which were at issue in the previous motions, have you turned over all of the other material in the FOIA request?

MR. FISHER: We notified them that it's all available in boxes at the City for them to come to inspect and they can make – indicate what they'd like copies of and they've never made one effort to obtain a single document.

THE COURT: So all the materials that was requested in the FOIA has been made available?

MR. FISHER: Yes. With the exception of the –

[4] THE COURT: Ballot jackets.

MR. FISHER: Right.

THE COURT: Do you dispute that?

MR. SANFIELD: Your Honor – yes, Judge.

Well, it would – what they were proposed (sic) to supply us with was a little bit of this and a little bit of that and, it wouldn't have really answered the –

THE COURT: Wait a minute. Mr. Sanfield, have you actually gone to the City and gotten the boxes that have been sitting there for your inspection?

MR. SANFIELD: No.

THE COURT: So you have no evidence to tell me whether or not it's complete or not?

MR. SANFIELD: Well originally – Judge, what we are basing that on is originally when the Defendant, responded to our FOIA request, she admitted that many of the records requested do not – do not exist.

THE COURT: Right.

MR. SANFIELD: And since we don't know what exists and which doesn't exist, we need the trial or an evidentiary hearing at a minimum.

THE COURT: You are not going to put the particular cart before this horse. You have never gone over to see what they actually have for you, [5] right?

MR. SANFIELD: That's what I said.

THE COURT: Okay:

MR. SANFIELD: I am not going to sit here and misrepresent anything but I mean that's ~~s-t~~rue but –

THE COURT: My question is –

MR. SANFIELD: There's rationale behind that, though, Judge.

THE COURT: If you haven't gone over and actually done – and looked at the documents and if you have not done any discovery, why do I need to give you a trial first?

MR. SANFIELD: Because even if we look – because the Plaintiff – strike that.

The Defendant admitted to destroying a multitude of documents. And since we don't know what's – what is available, what was destroyed –

THE COURT: Do you often go to trial without doing any discovery or looking at what documents are available?

MR. SANFIELD: No, Judge.

THE COURT: Okay. I needed to know that.

MR. SANFIELD: In other words, if you give us a you trial date, we will do that prior to the trial date so it's not something that we intend on just not [6] doing but I am convinced that would not resolve the case.

MR. FISHER: Your Honor –

THE COURT: I don't need to hear it, Mr. Fisher.

You said that you need a trial on the issue of – and this is your quote – "the preservation of the documents, absentee ballots and absentee ballot jackets until such time as the appellate court can rule upon the request of Plaintiff to review the disputed absentee ballots and absentee jackets."

All right. I am going to be really frank in saying I don't understand that assertion so you need to explain to me why you need a trial on the issue of the preservation of the ballots until after appellate review?

MR. SANFIELD: I'm going to let Mr. Korn address that because he's more familiar with that.

THE COURT: Quite frankly, Mr. Sanfield, you are the attorney of record.

MR. KORN: May I respond, though, for Mr. Sanfield?

THE COURT: No, because this is the way I do it. He's your attorney of record and we are not going to play tag.

[7] MR. SANFIELD: Judge, we put in our –

THE COURT: With all due respect, Mr. Korn.

MR. KORN: Thank you.

MR. SANFIELD: The reason we're asking for the trial Judge, I will make it clear – there's about six good points. What documents there are for production, what documents were destroyed and the circumstances surrounding the destruction, –

THE COURT: This sounds like discovery to me which you haven't conducted.

MR. SANFIELD: That's not – I don't think that's entirely correct, Judge.

THE COURT: Have you gone over and looked at what they do have for you right now?

MR. SANFIELD: No, but I will do that if you feel that's appropriate prior to –

THE COURT: Have you – I am back on this, Mr. Sanfield: We are talking practically now. You are in a civil case of which you want documents. You choose not to go look at the documents and then you say to the Court I want a trial date but I'm not going to go look at those documents until you tell me to go look at the documents?

MR. SANFIELD: Judge, there's been an admission, Judge, that a lot of documents were [8] destroyed and not available for inspection and we need to find out the

circumstances surrounding their unavailability and that's something that would be – that would be –

THE COURT: And you can't take discovery of that?

MR. SANFIELD: I could if you – it could be done in that fashion.

THE COURT: What other fashion would you want it done in in a civil case?

MR. SANFIELD: It doesn't usurp our right to a trial because –

THE COURT: It does if I don't feel there are any triable issues left if what I have been waiting for you all to do is to go up to the Court of Appeals and I don't even know when the time has run on that.

MR. FISHER: It's run.

MR. SANFIELD: I can address that. The reason that we didn't go up to the Court of Appeals, Judge, was because that would have required an interlocutory appeal and an interlocutory appeal requires setting forth facts showing how the appellant would suffer substantial harm by waiting a final judgment before taking an appeal.

We would not have suffered any substantial [9] harm by waiting for final disposition, so they would never have granted the interlocutory appeal. That's why we made a determination not to take an interlocutory appeal. We want a final disposition and then we can take the appropriate steps if necessary. An interlocutory appeal is an uphill battle and I don't think we've met the criteria.

MR. FISHER: Your Honor, may I be heard?

THE COURT: Now you may.

MR. FISHER: Thank you, your Honor.

Number one –

MR. SANFIELD: Judge, before Counsel –

MR. FISHER: Well, wait a minute. May I speak, your Honor?

THE COURT: Go ahead, Mr. Fisher.

MR. FISHER: Thank you.

When this case was initiated, your Honor, it was initiated against the wrong party Defendant. We filed a Motion for Summary Disposition. When we appeared for our arguments on the Motion, we resolved that Motion by providing that the Defendant would answer the Freedom of Information Act request, which we did.

The order further provided that in the event the Plaintiff was unsatisfied with that Order, they [10] would amend the Pleadings within 30 days or some specified number of days; put in the right party, and then we would go on with the case. That was never done.

We held up our end of the bargain. We made all of these files and so forth available. They've never made any effort to get one single shred of evidence. They never amended the caption of the case. They still don't have a proper party so – and their time has run out to do that.

That, in and of itself, in my judgment, and I would submit to the Court, terminates this case.

Number two, when the Court entered an Order – an Opinion And Order in this case on our cross-motions in

October of 2002, the Court made a ruling in terms of what things were protected and what things weren't protected and in the Court's Order at the end of the order, it was held that at the conclusion that the Court stayed enforcement of the ruling long enough to allow the parties to appeal with the proviso that if no appeal was filed, then either party may petition the Court for a final judgment; not a matter of further proceedings in the case but for a final judgment.

What then happened was that motions for [11] rehearing for filed before the Court and in response to the Motions for rehearing, the Court entered an order dated February 28th, 2003 and in that Order, the Court gave the – before enforcing the order again, the Court allowed the parties to file an appeal but there was no indication that there was a need to file anything else after that.

So it's self executing as a final judgment at that point. This case is over. This case was over on February 28th, 2003.

The whole notion of a trial, the whole notion of that this isn't – there isn't a final disposition is mind boggling and that we're kind of dancing around a notion of discovery and further proceedings. This case is over.

THE COURT: Mr. Sanfield?

MR. SANFIELD: Judge, this case is not over. That's what Counsel would like you to believe. And the Statute is clear that we're entitled to a trial and the reason – and it's an expedited trial.

And, the reason the Statute provides in that fashion is to avoid a little person who's requesting records from a governmental agency not to be bombarded with paper

work and motions and delays which are being paid for by the tax payers when the individual is [12] trying to obtain records and really can't afford to go against a sleeping giant so to speak. And that's the reason they have the expedited trial Statute.

THE COURT: Do you have an opportunity – do you have authority to request something through FOIA and then ignore what you're given?

MR. SANFIELD: Judge, let me – I want to back up here.

THE COURT: I am still trying to figure out your reasons for never going over there.

MR. SANFIELD: Because they did not respond in accordance with your April '02 order, which said they were to respond to our FOIA request.

What we did receive was a later [sic] dated April 19th from the City of Southfield but it was signed by Susan Silva. It was not signed by Nancy Banks.

Now Nancy Banks claims to be the FOIA coordinator then she sends in a response which really doesn't address what she was suppose to do anyhow

THE COURT: Mr. Sanfield, I don't know if you are – I choose to think that you are not deliberately ignoring me.

MR. SANFIELD: I'm not.

THE COURT: I think you're just misunderstanding me. You get information that there [13] is documents available for your inspection and copying a year and a half ago. You do nothing. A year and a half later you then

come to the court and say, I want a trial and they have to tell me where the documents are or why they haven't produced certain documents. You don't even know what they have produced because you haven't gone over there.

MR. SANFIELD: I am not denying that, Judge.

THE COURT: And I don't know why you haven't gone over there.

MR. SANFIELD: But – because it was felt that they were just humoring us so to speak.

THE COURT: You don't know what's in there. How can you say – how can you even say I think they're humoring me, I am not not going to bother with you. You didn't take the ten-minute car ride into Southfield – I have to see where your offices are. You didn't take a half-hour car ride into Southfield to see what they had for you.

Would you ever do that in any other court on any other case?

MR. SANFIELD: In hindsight maybe it should have been accomplished and I am not going to argue with you on that, Judge, but they didn't respond – see what happens is every time we have a motion, Mr.

* * *

EXHIBIT I

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

STEPHEN P. KORN,

Plaintiff

Vrs.

NANCY BANKS, in her official capacity, As Clerk for the City of Southfield, Michigan

Defendant
_____/

Case no. 01-035929 CZ
Judge: Nanci J. Grant

MONTE M. KORN (P-16154)
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STEPHEN P. KORN (P-30913)
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PO Box 3040
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48333-3040
248-539-2818

_____/

PLAINTIFF'S AFFIDAVIT IN SUPPORT OF MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANT, NANCY BANKS SHOULD NOT BE HELD IN CONTEMPT OF COURT FOR VIOLATION OF THIS COURT'S INJUNCTIVE ORDER OF AUGUST 14, 2002 PROHIBITING THE DESTRUCTION OF THE ABSENTEE BALLOTS WHICH ARE A SUBJECT OF THIS LITIGATION

(Filed Jul. 30, 2003)

STATE OF MICHIGAN)
) SS
COUNTY OF MACOMB)

STEPHEN P. KORN, bei ıg first duly sworn, deposes and says:

1. That I am the Plaintiff in this Freedom of Information case.

2. That on multiple occasions, I spoke with officials with the Michigan Department of Elections concerning this Freedom of Information case.

3. That inquiry was made by the undersigned to obtain permission to be placed on the agenda of a public meeting of the State Board of Canvassers to secure their help in obtaining a "review" of the subject absentee ballots in dispute, pursuant to Administrative Rules and particularly 168.790(19), which states:

> "Ballots used at an election may be destroyed after 30 days following the final determination of the board of canvassers with respect to the election, unless their destruction has been stayed by an order of a court or the secretary of

state. Ballots shall not be released for examination, review, or research unless prior approval is obtained by the board of state canvassers."

4. That Mr. Brad Wittman, Director, Communications and Training Division, reported and confirmed in two separate conversations, that the particular ballots which are a subject of this litigation, and subject of this Court's injunctive order of August 14, 2002, were previously reported destroyed by Defendant, Nancy Banks.

5. That the destruction of the subject matter of this litigation, if true, is contemptuous conduct, a fraud upon the Court, and obstruction of justice.

6. That Mr. Brad Wittman, also confirmed his view that the ballot jackets in dispute were public record available for public review and inspection.

7. That Trial in this matter should be conducted to compel Defendant's testimony as to the whereabouts of the public documents which are a subject of this litigation, and for the production of such documents for review.

Further deponent sayeth not.

/s/ [Illegible]
Stephen P. Korn

Signed and sworn to this 29th day of July, 2003

/s/ [Illegible]
Monte M. Korn, Notary Public
Oakland County, Notary,
acting in Macomb County,
My commission expires: July 4, 2006

EXHIBIT J

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

STEPHEN P. KORN,

Plaintiff,

vs.

NANCY BANKS, in her official capacity, as Clerk for the City of Southfield, Michigan

Case no. 01-035929 CZ
Honorable Nanci J. Grant

Defendant.

Gary R. Sanfield (P27984)
Attorney for Plaintiff
42645 Garfield, Suite 101
Clinton Township, MI 48038
(586) 228-2000

Gerald A. Fisher (P13462)
Attorney for Defendant
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI
48333-3040
248-539-2818

AFFIDAVIT OF NANCY BANKS, CLERK OF THE CITY OF SOUTHFIELD

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

Nancy Banks, being first duly sworn, deposes and states as follows, based upon the best of her knowledge, information and belief:

1. I am the City Clerk of the City of Southfield and have served as City Clerk since November 15, 1999.

2. When this case was filed as understood by Affiant, it involved an attempt by Plaintiff to secure a substantial volume of documentation relating to the 1999 election held in the City of Southfield.

3. On or about Friday, April 19, 2002, consistent with the order of this Court, the City provided its response to Plaintiff's FOIA request, making available to Plaintiff several boxes of material relevant to the election in question. Such response made available to Plaintiff substantially all of the of the [sic] information requested, with the exception of certain absentee ballots within envelopes not counted in 1999 election because they were received by the City after the close of the polls (the "**Subject Absentee Ballots and Envelopes**").

4. Following the 1999 initiation of the companion case to the present matter (Oakland County Circuit Court, Case No. 99-019368-AW, entitled *Sidney Lantz v. Nancy Banks*) the Subject Absentee Ballots and Envelopes were placed in a vault under the control of Clerk of the City of Southfield.

5. From the date in 1999 in which the companion case to this matter was initiated, until approximately August 14, 2005, although no Court order was requested or entered requiring it, the City of Southfield Clerk's office voluntarily continued to hold and retain the Subject Absentee Ballots and Envelopes in a vault under the control of Clerk of the City of Southfield.

6. On or about August 14, 2002, *on its own motion*, after the City had clarified to the Court that the Subject Absentee Ballots and Envelopes had been voluntarily retained, the Court entered an Order requiring the existing "uncounted absentee ballots" (i.e., the Subject Absentee Ballots and Envelopes) to be maintained in the Clerk's custody "until further order of the Court."

7. Although the City's FOIA response made available to Plaintiff substantially all of the of the [sic] information requested, to Affiant's best knowledge and belief, Plaintiff has made no contact with Affiant to examine such voluminous documentation.

8. Affiant has continued to this day to hold and retain the Subject Absentee Ballots and Envelopes in a vault under the control of Clerk of the City of Southfield.

9. The allegations that Affiant has destroyed the Subject Absentee Ballots and Envelopes, that Affiant has acted contemptuously, has perpetrated a fraud upon the Court and the judicial process, and that Affiant has obstructed justice, are all false and untrue.

/s/ Nancy L. M[Illegible]
Nancy Banks

Subscribed and sworn to before me
this 14th day of August, 2003.

/s/ Teresa M. Collins
Notary Public

TERESA M. COLLINS
Notary Public, Oakland County, Michigan
My Commission Expires October 30, 2004